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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1984

FEBRUARY 20 THROUGH MARCH 26, 1985

HENRY C. LIND
REPORTER OF DECISIONS

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ERRATA

196 U. S. 374, line 35: "*Cockran*" should be "*Corkran*".
461 U. S. 946, line 13: "110 Wis." should be "110 Wis. 2d".

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS*

WARREN E. BURGER, Chief Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
BYRON R. WHITE, Associate Justice.
THURGOOD MARSHALL, Associate Justice.
HARRY A. BLACKMUN, Associate Justice.
LEWIS F. POWELL, Jr., Associate Justice.
WILLIAM H. REHNQUIST, Associate Justice.
JOHN PAUL STEVENS, Associate Justice.
SANDRA DAY O'CONNOR, Associate Justice.

RETIRED

POTTER STEWART, Associate Justice.

OFFICERS OF THE COURT

WILLIAM FRENCH SMITH, Attorney General.[1]
EDWIN MEESE III, Attorney General.[2]
REX E. LEE, Solicitor General.
ALEXANDER L. STEVAS, Clerk.
HENRY C. LIND, Reporter of Decisions.
ALFRED WONG, Marshal.
ROGER F. JACOBS, Librarian.

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*For notes, see p. IV.

NOTES

[1] Attorney General Smith resigned effective February 25, 1985.

[2] The Honorable Edwin Meese III, of California, was nominated to be Attorney General by President Reagan on February 25, 1984; the nomination was confirmed by the Senate on February 23, 1985; he was commissioned on the same date and took the oath of office on February 25, 1985. He was presented to the Court on March 25, 1985 (see *post*, p. VII).

SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective *nunc pro tunc* October 1, 1981, *viz.:*

For the District of Columbia Circuit, WARREN E. BURGER, Chief Justice.

For the First Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Second Circuit, THURGOOD MARSHALL, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, WARREN E. BURGER, Chief Justice.

For the Fifth Circuit, BYRON R. WHITE, Associate Justice.

For the Sixth Circuit, SANDRA DAY O'CONNOR, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, WILLIAM H. REHNQUIST, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

For the Eleventh Circuit, LEWIS F. POWELL, JR., Associate Justice.

October 5, 1981.

Pursuant to the provisions of Title 28, United States Code, Section 42, *it is ordered* that the Chief Justice be, and he hereby is, assigned to the Federal Circuit as Circuit Justice, effective October 1, 1982.

October 12, 1982.

(For next previous allotment, see 423 U. S., p. VI.)

PRESENTATION OF THE ATTORNEY GENERAL

SUPREME COURT OF THE UNITED STATES

MONDAY, MARCH 25, 1985

Present: CHIEF JUSTICE BURGER, JUSTICE BRENNAN, JUSTICE WHITE, JUSTICE MARSHALL, JUSTICE BLACKMUN, JUSTICE POWELL, JUSTICE REHNQUIST, JUSTICE STEVENS, and JUSTICE O'CONNOR.

Mr. Solicitor General Rex E. Lee said:

MR. CHIEF JUSTICE, and may it please the Court, I have the honor to present to the Court the seventy-fifth Attorney General of the United States, the Honorable Edwin Meese III.

THE CHIEF JUSTICE said:

Mr. Attorney General, on behalf of the Court I welcome you as the chief law officer of the Government and as an officer of this Court. We welcome you to the performance of the very important duties which will rest on you by virtue of your office. Your commission as Attorney General of the United States will be placed in the records of the Court. We wish you well in your new office.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1984

UNITED STATES *v.* YOUNG

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 83–469. Argued October 2, 1984—Decided February 20, 1985

Respondent was charged with various federal offenses involving a scheme to defraud a refinery by submitting false certifications that oil purchased by the refinery from respondent's company was crude oil when in fact it was less valuable fuel oil. At the trial in District Court, defense counsel in his closing argument impugned the prosecutor's integrity and charged that the prosecutor did not believe in the Government's case. No objection to defense counsel's summation was made at the time, but in rebuttal arguments the prosecutor stated his opinion that respondent was guilty and urged the jury to "do its job"; defense counsel made no objection. Respondent was convicted on several counts, and on appeal alleged that he was unfairly prejudiced by the prosecutor's response to defense counsel's argument. The Court of Appeals reversed and remanded for a new trial, holding that under case law of that Circuit, such remarks constituted misconduct and were plain error, and that appellate review was not precluded by defense counsel's failure to object at trial.

Held: The prosecutor's remarks during the rebuttal argument, although error, did not constitute "plain error" that a reviewing court could properly act on under Federal Rule of Criminal Procedure 52(b), absent a timely objection by defense counsel; on the record, the challenged argument did not undermine the fairness of the trial. Pp. 6–20.

(a) The kind of advocacy on both sides as shown by the record has no place in the administration of justice and should neither be permitted nor rewarded; the appropriate solution is for the trial judge to deal promptly with any breach by either counsel. Pp. 6–11.

(b) The issue is not the prosecutor's license to make otherwise improper arguments, but whether his "invited response" taken in context unfairly prejudiced the defendant. *Lawn* v. *United States*, 355 U. S. 339. In order to make an appropriate assessment, the reviewing court must not only weigh the impact of the prosecutor's remarks, but must also take into account defense counsel's conduct. The impact of the evaluation has been that if the prosecutor's remarks were "invited" and did no more than respond substantially in order to "right the scale," such comments would not warrant reversing a conviction. Pp. 11–14.

(c) The plain-error exception of Rule 52(b) to the contemporaneous-objection requirement is to be used only in those circumstances in which a miscarriage of justice would otherwise result. Especially when addressing plain error, a reviewing court cannot properly evaluate a case except by viewing such a claimed error against the entire record. When reviewed under these principles, the prosecutor's remarks in this case did not rise to the level of plain error. Viewed in context, the remarks, although inappropriate and amounting to error, were not such as to undermine the fundamental fairness of the trial and contribute to a miscarriage of justice. Pp. 14–20.

736 F. 2d 565, reversed.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. BRENNAN, J., filed an opinion concurring in part and dissenting in part, in which MARSHALL and BLACKMUN, JJ., joined, *post*, p. 20. STEVENS, J., filed a dissenting opinion, *post*, p. 35.

Michael W. McConnell argued the cause *pro hac vice* for the United States. With him on the briefs were *Solicitor General Lee*, *Assistant Attorney General Trott*, *Deputy Solicitor General Frey*, and *Louis M. Fischer*.

Burck Bailey argued the cause and filed a brief for respondent.

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to review the reversal of respondent's conviction because of prosecutorial comments responding to defense counsel's closing argument impugning the prosecution's integrity and belief in the Government's case.

I

Respondent Billy G. Young, as vice president and general manager of the Compton Petroleum Corporation in Abilene, Texas, contracted in 1976 and 1977 to deliver monthly supplies of "sweet" crude oil to the Apco Oil Corporation refinery in Cyril, Oklahoma. Some 205,000 barrels of oil were delivered under the contract between January and September 1977, but more than half of the oil delivered to Apco, approximately 117,250 barrels, consisted of fuel oil, an already refined product less valuable than crude oil. Compton's invoices accompanying those deliveries falsely certified that all of the oil was crude. Apco relied on those false certifications and reported to the Federal Energy Administration, in compliance with Government regulations, 10 CFR §§211.66, 211.67, and 212.131 (1976), the amount of crude oil it thought it was refining each month. The Federal Energy Administration in turn relied on Apco's reports to determine the national averages of tier categories of refined oil for purposes of equalizing the cost of crude oil under its entitlement program.

Respondent's scheme to deceive Apco by selling it cheaper fuel oil masquerading as "sweet" crude oil was relatively simple. Respondent arranged with an oil brokerage firm, owned by a longtime friend, to procure fuel oil from another source and sell it to Compton under the false certification that it was crude oil. Compton would then pay the brokerage firm 10 cents per barrel commission as a fee for the "recertification." Once in Compton's storage tanks, respondent had the fuel oil disguised as crude oil before delivering it to Apco by blending condensate, a high gravity liquid taken from the wellheads of natural gas wells, with the fuel oil.[1] In September 1977, after an Apco technician performed a distillation test on one of Compton's deliveries, Apco discovered that it had not been receiving crude oil as required by the contract, but rather a mixture of fuel oil and condensate. This discovery prompted the Federal Bureau of Investigation to launch an investigation which resulted in this prosecution.

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[1] Apco wanted a high gravity crude oil for gasoline production. A high gravity crude oil yields greater quantities of gasoline and diesel fuels after refining than does a lower gravity crude oil, which yields more fuel oil and asphalt. Fuel oil, on the other hand, has a low gravity and was neither what Apco needed nor what it thought it was buying.

On December 1, 1980, respondent and Compton were charged with 11 counts of mail fraud in violation of 18 U. S. C. § 1341, three counts of willfully and knowingly making false statements to a Government agency in violation of 18 U. S. C. § 1001, one count of interstate transportation of stolen property in violation of 18 U. S. C. § 2314, and with aiding and abetting in the commission of all 15 counts in violation of 18 U. S. C. § 2. A jury trial was held in the District Court for the Western District of Oklahoma.[2] In his own defense, respondent testified that he had knowingly purchased fuel oil and delivered it to Apco, but he claimed that he thought such fuel oil could legitimately be certified as crude oil. He also believed that if condensate were blended with fuel oil, the result would be the equivalent of crude oil. Because Apco had not complained about the deliveries before September 1977, respondent thought that Apco was satisfied with the quality of oil he was supplying.

At the close of the case, the prosecutor summarized the evidence against respondent. Defense counsel began his own summation by arguing that the case against respondent "has been presented unfairly by the prosecution," and that "[f]rom the beginning" to "this very moment the [prosecution's] statements have been made to poison your minds unfairly." Tr. 542. He intimated that the prosecution deliberately withheld exculpatory evidence, and proceeded to charge the prosecution with "reprehensible" conduct in purportedly attempting to cast a false light on respondent's activities. Defense counsel also pointed directly at the prosecutor's table and stated: "I submit to you that there's not a person in this courtroom including those sitting at this table who think that Billy Young intended to defraud Apco." *Id.*, at 543–544. Finally, defense counsel stated that respondent had been "the only one in this whole affair that has acted with honor and with integrity" and that "[t]hese complex [Department of Energy] regulations should not have any place in an effort to put someone away." *Id.*, at 547.

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[2] Prior to trial, the District Court accepted Compton's plea of *nolo contendere* and imposed a fine.

The prosecutor did not object to defense counsel's summation, but in rebuttal argument he responded to defense counsel's claim that the Government did not believe in its own case:

> "I think [defense counsel] said that not anyone sitting at this table thinks that Mr. Young intended to defraud Apco. Well, I was sitting there and I think he was. I think he got 85 cents a barrel for every one of those 117,250.91 barrels he hauled and every bit of the money they made on that he got one percent of. So, I think he did. If we are allowed to give our personal impressions *since it was asked of me.*" *Id.*, at 549. (Emphasis added.)

Continuing with a review of portions of the evidence against respondent, the prosecutor responded to defense counsel's statement that Apco was not defrauded:

> "I don't know what you call that, I call it fraud.
>
> "You can look at the evidence and you can remember the testimony, you remember what [the witnesses] said and what [respondent] admitted they said. I think it's a fraud." *Id.*, at 550.

Finally, the prosecutor addressed defense counsel's claim that respondent had acted with honor and integrity. The prosecutor briefly recapped some of respondent's conduct and stated:

> "I don't know whether you call it honor and integrity, I don't call it that, [defense counsel] does. If you feel you should acquit him for that it's your pleasure. I don't

> think you're doing your job as jurors in finding facts as opposed to the law that this Judge is going to instruct you, you think that's honor and integrity then stand up here in Oklahoma courtroom and say that's honor and integrity; I don't believe it." *Id.*, at 552.

In turn, defense counsel did not object to the prosecutor's statements. Nor did he request any curative instructions and none were given.

The jury returned a verdict of guilty as to each of the mail fraud and false statement counts. Respondent was acquitted of interstate transportation of stolen property. Respondent was sentenced to two years' imprisonment on each count, to be served concurrently, and was fined $39,000.

On appeal, respondent alleged that he was unfairly prejudiced by the prosecutor's remarks made during closing rebuttal argument. In a *per curiam* opinion, the Court of Appeals, one judge dissenting without opinion, reversed the conviction and remanded for retrial. 736 F. 2d 565 (CA10 1983). The Court of Appeals held that the prosecutor's statements constituted misconduct and were sufficiently egregious to constitute plain error. In short, respondent's failure to object at trial was held not to preclude appellate review. Rejecting the Government's contention that the statements were invited by the defense counsel's own closing argument, the Court of Appeals stated that "the rule is clear in this Circuit that improper conduct on the part of opposing counsel should be met with an objection to the court, not a similarly improper response." *Id.*, at 570.

We granted certiorari, 465 U. S. 1021 (1984). We now reverse.

II

The principal issue to be resolved is not whether the prosecutor's response to defense counsel's misconduct was appropriate, but whether it was "plain error" that a reviewing court could act on absent a timely objection. Our task is to decide whether the standard laid down in *United States* v. *Atkinson,* 297 U. S. 157, 160 (1936), and codified in Federal Rule of Criminal Procedure 52(b), was correctly applied by the Court of Appeals.

Nearly a half century ago this Court counselled prosecutors "to refrain from improper methods calculated to produce a wrongful conviction . . . ." *Berger* v. *United States,* 295 U. S. 78, 88 (1935). The Court made clear, however, that the adversary system permits the prosecutor to "prosecute with earnestness and vigor." *Ibid.* In other words, "while he may strike hard blows, he is not at liberty to strike foul ones." *Ibid.*

The line separating acceptable from improper advocacy is not easily drawn; there is often a gray zone. Prosecutors sometimes breach their duty to refrain from overzealous conduct by commenting on the defendant's guilt and offering unsolicited personal views on the evidence. Accordingly, the legal profession, through its Codes of Professional Responsibility,[3] and the federal courts,[4] have tried to police prosecutorial misconduct. In complementing these efforts, the American Bar Association's Standing Committee on Standards for Criminal Justice has promulgated useful guidelines, one of which states that

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[3] See, *e. g.,* ABA Model Code of Professional Responsibility DR 7–106(C) (1980), which provides in pertinent part:

"In appearing in his professional capacity before a tribunal, a lawyer shall not:

. . . . .

"(3) Assert his personal knowledge of the facts in issue, except when testifying as a witness.

"(4) Assert his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but he may argue, on his analysis of the evidence, for any position or conclusion with respect to matters stated herein."

See also ABA Model Rules of Professional Conduct, Rule 3.4(e) (1984).

[4] See, *e. g., United States* v. *DiPasquale,* 740 F. 2d 1282, 1296 (CA3 1984); *United States* v. *Maccini,* 721 F. 2d 840, 846 (CA1 1983); *United States* v. *Harrison,* 716 F. 2d 1050, 1051 (CA4 1983); *United States* v. *Bagaric,* 706 F. 2d 42, 58–61 (CA2 1983); *United States* v. *West,* 680 F. 2d 652, 655–656 (CA9 1982); *United States* v. *Garza,* 608 F. 2d 659, 665–666 (CA5 1979).

> "[i]t is unprofessional conduct for the prosecutor to express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant." ABA Standards for Criminal Justice 3–5.8(b) (2d ed. 1980).[5]

It is clear that counsel on both sides of the table share a duty to confine arguments to the jury within proper bounds. Just as the conduct of prosecutors is circumscribed, "[t]he interests of society in the preservation of courtroom control by the judges are no more to be frustrated through unchecked improprieties by defenders." *Sacher* v. *United States*, 343 U. S. 1, 8 (1952). Defense counsel, like the prosecutor, must refrain from interjecting personal beliefs into the presentation of his case. See, *e. g.*, ABA Model Code of Professional Responsibility DR 7–106(C)(3) and (4) (1980), quoted in n. 3, *supra;* ABA Model Rules of Professional Conduct, Rule 3.4(e) (1984). Defense counsel, like his adversary, must not be permitted to make unfounded and inflammatory attacks on the opposing advocate.[6]

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[5] The remaining text of ABA Standards for Criminal Justice 3–5.8 (2d ed. 1980) provides:

"(a) The prosecutor may argue all reasonable inferences from evidence in the record. It is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw.

. . . . .

"(c) The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury.

"(d) The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict.

"(e) It is the responsibility of the court to ensure that final argument to the jury is kept within proper, accepted bounds."

The accompanying commentary succinctly explains one of the critical policies underlying these proscriptions:

"Expressions of personal opinion by the prosecutor are a form of unsworn, unchecked testimony and tend to exploit the influence of the prosecutor's office and undermine the objective detachment that should separate a lawyer from the cause being argued." *Id.*, at 3·89.

The kind of advocacy shown by this record has no place in the administration of justice and should neither be permitted nor rewarded; a trial judge should deal promptly with any breach by either counsel. These considerations plainly guided the ABA Standing Committee on Standards for Criminal Justice in laying down rules of trial conduct for counsel that quite properly hold all advocates to essentially the same standards.[7] Indeed, the accompanying commentary points out that "[i]t should be accepted that both prosecutor and defense counsel are subject to the same general limitations in the scope of their argument," ABA Standards for Criminal Justice 4–7.8, p. 4·97, and provides the following guideline:

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[6] Of course, when defense counsel employs tactics which would be reversible error if used by a prosecutor, the result may be an unreviewable acquittal. The prosecutor's conduct and utterances, however, are always reviewable on appeal, for he is "both an administrator of justice and an advocate." ABA Standard for Criminal Justice 3–1.1(b) (2d ed. 1980); cf. *Berger* v. *United States*, 295 U. S. 78, 88 (1935).

[7] ABA Standard for Criminal Justice 4–7.8 provides:

"(a) In closing argument to the jury the lawyer may argue all reasonable inferences from the evidence in the record. It is unprofessional conduct for a lawyer intentionally to misstate the evidence or mislead the jury as to the inferences it may draw.

"(b) It is unprofessional conduct for a lawyer to express a personal belief or opinion in his client's innocence or personal belief or opinion in the truth or falsity of any testimony or evidence, or to attribute the crime to another person unless such an inference is warranted by the evidence.

"(c) A lawyer should not make arguments calculated to inflame the passions or prejudices of the jury.

"(d) A lawyer should refrain from argument which would divert the jury from its duty to decide the case on the evidence by injecting issues broader than the guilt or innocence of the accused under the controlling law or by making predictions of the consequences of the jury's verdict.

"(e) It is the responsibility of the court to ensure that final argument to the jury is kept within proper, accepted bounds."

> "The prohibition of personal attacks on the prosecutor is but a part of the larger duty of counsel to avoid acrimony in relations with opposing counsel during trial and confine argument to record evidence. It is firmly established that the lawyer should abstain from any allusion to the personal peculiarities and idiosyncrasies of opposing counsel. A personal attack by the prosecutor on defense counsel is improper, and the duty to abstain from such attacks is obviously reciprocal." *Id.*, at 4·99 (footnotes omitted).

These standards reflect a consensus of the profession that the courts must not lose sight of the reality that "[a] criminal trial does not unfold like a play with actors following a script." *Geders* v. *United States*, 425 U. S. 80, 86 (1976). It should come as no surprise that "in the heat of argument, counsel do occasionally make remarks that are not justified by the testimony, and which are, or may be, prejudicial to the accused." *Dunlop* v. *United States*, 165 U. S. 486, 498 (1897).[8]

We emphasize that the trial judge has the responsibility to maintain decorum in keeping with the nature of the proceeding; "the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct." *Quercia* v. *United States*, 289 U. S. 466, 469 (1933). The judge "must meet situations as they arise and [be able] to cope with . . . the contingencies inherent in the adversary process." *Geders* v. *United States*, *supra*, at 86. Of course, "hard blows" cannot be avoided in criminal trials; both the prosecutor and defense counsel must be kept within appropriate bounds. See *Herring* v. *New York*, 422 U. S. 853, 862 (1975).

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[8] Learned Hand observed: "It is impossible to expect that a criminal trial shall be conducted without some showing of feeling; the stakes are high, and the participants are inevitably charged with emotion." *United States* v. *Wexler*, 79 F. 2d 526, 529–530 (CA2 1935), cert. denied, 297 U. S. 703 (1936).

III

The situation brought before the Court of Appeals was but one example of an all too common occurrence in criminal trials—the defense counsel argues improperly, provoking the prosecutor to respond in kind, and the trial judge takes no corrective action. Clearly two improper arguments—two apparent wrongs—do not make for a right result. Nevertheless, a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context; only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial. To help resolve this problem, courts have invoked what is sometimes called the "invited response" or "invited reply" rule, which the Court treated in *Lawn* v. *United States*, 355 U. S. 339 (1958).

The petitioners in *Lawn* sought to have the Court overturn their criminal convictions for income tax evasion on a number of grounds, one of which was that the prosecutor's closing argument deprived them of a fair trial. In his closing argument at trial, defense counsel in *Lawn* had attacked the Government for "persecuting" the defendants. He told the jury that the prosecution was instituted in bad faith at the behest of federal revenue agents and asserted that the Government's key witnesses were perjurers. The prosecutor in response vouched for the credibility of the challenged witnesses, telling the jury that the Government thought those witnesses testified truthfully. In concluding that the prosecutor's remarks, when viewed within the context of the entire trial, did not deprive petitioners of a fair trial, the Court pointed out that defense counsel's "comments clearly invited the reply." *Id.*, at 359–360, n. 15.

This Court's holding in *Lawn* was no more than an application of settled law. Inappropriate prosecutorial comments, standing alone, would not justify a reviewing court to reverse a criminal conviction obtained in an otherwise fair proceeding. Instead, as *Lawn* teaches, the remarks must be examined within the context of the trial to determine whether the prosecutor's behavior amounted to prejudicial error. In other words, the Court must consider the probable effect the prosecutor's response would have on the jury's ability to judge the evidence fairly. In this context, defense counsel's conduct, as well as the nature of the prosecutor's response, is relevant. See *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 242 (1940); *Crumpton* v. *United States*, 138 U. S. 361, 364 (1891). Indeed most Courts of Appeals, applying these holdings, have refused to reverse convictions where prosecutors have responded reasonably in closing argument to defense counsel's attacks, thus rendering it unlikely that the jury was led astray.[9]

In retrospect, perhaps the idea of "invited response" has evolved in a way not contemplated. *Lawn* and the earlier cases cited above should not be read as suggesting judicial approval or—encouragement—of response-in-kind that inevitably exacerbates the tensions inherent in the adversary process. As *Lawn* itself indicates, the issue is not the prosecutor's license to make otherwise improper arguments, but whether the prosecutor's "invited response," taken in context, unfairly prejudiced the defendant.

In order to make an appropriate assessment, the reviewing court must not only weigh the impact of the prosecutor's remarks, but must also take into account defense counsel's opening salvo. Thus the import of the evaluation has been that if the prosecutor's remarks were "invited," and did no more than respond substantially in order to "right the scale," such comments would not warrant reversing a conviction.[10]

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[9] See, *e. g.*, *United States* v. *DiPasquale*, 740 F. 2d, at 1296; *United States* v. *Maccini*, 721 F. 2d, at 846; *United States* v. *Harrison*, 716 F. 2d, at 1052; *United States* v. *Trujillo*, 714 F. 2d 102, 105 (CA11 1983); *United States* v. *West*, 670 F. 2d 675, 688–689 (CA7 1982); *United States* v. *Tham*, 665 F. 2d 855, 862 (CA9 1981); *United States* v. *Schwartz*, 655 F. 2d 140, 142 (CA8 1981) *(per curiam)*; *United States* v. *Praetorius*, 622 F. 2d 1054, 1060–1061 (CA2 1979); *United States* v. *Kim*, 193 U. S. App. D. C. 370, 381–383, 595 F. 2d 755, 767–768 (1979).

Courts have not intended by any means to encourage the practice of zealous counsel's going "out of bounds" in the manner of defense counsel here, or to encourage prosecutors to respond to the "invitation." Reviewing courts ought not to be put in the position of weighing which of two inappropriate arguments was the lesser. "Invited responses" can be effectively discouraged by prompt action from the bench in the form of corrective instructions to the jury and, when necessary, an admonition to the errant advocate.

Plainly, the better remedy in this case, at least with the accurate vision of hindsight, would have been for the District Judge to deal with the improper argument of the defense counsel promptly and thus blunt the need for the prosecutor to respond. Arguably defense counsel's misconduct could have warranted the judge to interrupt the argument and admonish him, see *Viereck* v. *United States*, 318 U. S. 236, 248 (1943), thereby rendering the prosecutor's response unnecessary. Similarly, the prosecutor at the close of defense summation should have objected to the defense counsel's improper statements with a request that the court give a timely warning and curative instruction to the jury. Defense counsel, even though obviously vulnerable, could well have done likewise if he thought that the prosecutor's remarks were harmful to his client. Here neither counsel made a timely objection to preserve the issue for review. See *Donnelly* v. *DeChristoforo*, 416 U. S. 637, 644 (1974). However, interruptions of arguments, either by an opposing counsel or the presiding judge, are matters to be approached cautiously. At the very least, a bench conference might have been convened out of the hearing of the jury once defense counsel closed, and an appropriate instruction given.

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[10] Assuming the prosecutor's remarks exceeded permissible bounds and defense counsel raised a timely objection, a reviewing court could reverse an otherwise proper conviction only after concluding that the error was not harmless. See *United States* v. *Hasting*, 461 U. S. 499 (1983).

IV

Here the Court of Appeals was not unaware of our holdings and those of other Circuits, but seemingly did not undertake to weigh the prosecutor's comments in context. The court acknowledged defense counsel's obvious misconduct, but it does not appear that this was given appropriate weight in evaluating the situation.

We share the Court of Appeals' desire to minimize "invited responses"; and we agree that the prosecutor's response constituted error. In addition to departing from the Tenth Circuit's "rule" prohibiting such remarks,[11] the prosecutor's comments crossed the line of permissible conduct established by the ethical rules of the legal profession, as did defense counsel's argument, see *supra*, at 6–10, and went beyond what was necessary to "right the scale" in the wake of defense counsel's misconduct. Indeed the prosecutor's first error was in failing to ask the District Judge to deal with defense counsel's misconduct.

As we suggested earlier, the dispositive issue under the holdings of this Court is not whether the prosecutor's remarks amounted to error, but whether they rose to the level of "plain error" when he responded to defense counsel. In this setting and on this record the prosecutor's response—although error—was not "plain error" warranting the court to overlook the absence of any objection by the defense.

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[11] Until this decision, the Tenth Circuit's "rule" appeared largely as dicta in earlier opinions. See, *e. g.*, *United States* v. *Rios*, 611 F. 2d 1335, 1343 (CA10 1979); *United States* v. *Latimer*, 511 F. 2d 498, 503 (CA10 1975); *United States* v. *Martinez*, 487 F. 2d 973, 977 (CA10 1973); *United States* v. *Coppola*, 479 F. 2d 1153, 1163 (CA10 1973). But see *United States* v. *Ludwig*, 508 F. 2d 140, 143 (CA10 1974) (court recites rule in context of rejecting Government's argument that the prosecutor's concededly improper remarks were harmless error in light of defense counsel's conduct).

The plain-error doctrine of Federal Rule of Criminal Procedure 52(b)[12] tempers the blow of a rigid application of the contemporaneous-objection requirement. The Rule authorizes the Courts of Appeals to correct only "particularly egregious errors," *United States* v. *Frady*, 456 U. S. 152, 163 (1982), those errors that "seriously affect the fairness, integrity or public reputation of judicial proceedings," *United States* v. *Atkinson*, 297 U. S., at 160. In other words, the plain-error exception to the contemporaneous-objection rule is to be "used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result." *United States* v. *Frady*, 456 U. S., at 163, n. 14. Any unwarranted extension of this exacting definition of plain error would skew the Rule's "careful balancing of our need to encourage all trial participants to seek a fair and accurate trial the first time around against our insistence that obvious injustice be promptly redressed." *Id.*, at 163 (footnote omitted). Reviewing courts are not to use the plain-error doctrine to consider trial court errors not meriting appellate review absent timely objection[13]—a practice which we have criticized as "extravagant protection." *Henderson* v. *Kibbe*, 431 U. S. 145, 154, n. 12 (1977); *Namet* v. *United States*, 373 U. S. 179, 190 (1963).

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[12] Federal Rule of Criminal Procedure 52(b) provides:

"Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

The Advisory Committee's Notes indicate that the Rule restated existing law as set forth by this Court in *Wiborg* v. *United States*, 163 U. S. 632 (1896):

"[A]lthough this question was not properly raised, yet if a plain error was committed in a manner so absolutely vital to defendants, we feel ourselves at liberty to correct it." *Id.*, at 658. See Advisory Committee's Notes on Fed. Rule Crim. Proc. 52(b), 18 U. S. C. App., p. 657.

A review of the drafting that led to the Rule shows that the Committee sought to enable the courts of appeals to review prejudicial errors "so that any miscarriage of justice may be thwarted." Advisory Committee on Rules of Criminal Procedure to the Supreme Court of the United States, Federal Rules of Criminal Procedure, Preliminary Draft 263 (1943).

The Committee's use of the disjunctive in the phrasing of the Rule is misleading, for as one commentator has noted, this "may simply be a means of distinguishing for definitional purposes between 'errors' (*e. g.*, exclusion of evidence) and 'defects' (*e. g.*, defective pleading)," and in either case the Rule applies only to errors affecting substantial rights. 8B J. Moore, Moore's Federal Practice ¶ 52.02[2], p. 52–4, and n. 7 (2d ed. 1984).

Especially when addressing plain error, a reviewing court cannot properly evaluate a case except by viewing such a claim against the entire record. We have been reminded:

> "In reviewing criminal cases, it is particularly important for appellate courts to relive the whole trial imaginatively and not to extract from episodes in isolation abstract questions of evidence and procedure. To turn a criminal trial into a quest for error no more promotes the ends of justice than to acquiesce in low standards of criminal prosecution." *Johnson* v. *United States*, 318 U. S. 189, 202 (1943) (Frankfurter, J., concurring).

It is simply not possible for an appellate court to assess the seriousness of the claimed error by any other means. As the Court stated in *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S., at 240, "each case necessarily turns on its own facts."

When reviewed with these principles in mind, the prosecutor's remarks cannot be said to rise to the level of plain error. Viewed in context, the prosecutor's statements, although inappropriate and amounting to error, were not such as to undermine the fundamental fairness of the trial and contribute to a miscarriage of justice. See *United States* v. *Frady*, *supra*, at 163; *United States* v. *Atkinson*, *supra*, at 160.[14]

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[13] In *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150 (1940), for example, the Court held that "counsel for the defendant cannot as a rule remain silent, interpose no objections, and after a verdict has been returned seize for the first time on the point that [the prosecutor's] comments to the jury were improper and prejudicial." *Id.*, at 238–239.

[14] The Court of Appeals held that the prosecutor's improper remarks constituted "plain error" solely because the prosecutor ignored that court's

The prosecutor responded with his "personal impressio[n]," Tr. 549, that respondent intended to commit a fraud to answer defense counsel's accusation that no member of the prosecution team believed that respondent intended to defraud Apco. Indeed, the prosecutor made a point to preface his statement by summarizing defense counsel's acerbic charge and candidly told the jury that he was giving his "personal impressions" because defense counsel had asked for them.

Notwithstanding the defense counsel's breach of ethical standards, the prosecutor's statement of his belief that the evidence showed Apco had been defrauded should not have been made; it was an improper expression of personal opinion and was not necessary to answer defense counsel's improper assertion that no one on the prosecution team believed respondent intended to defraud Apco. Nevertheless, we conclude that any potential harm from this remark was mitigated by the jury's understanding that the prosecutor was countering defense counsel's repeated attacks on the

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rule prohibiting such responses. A *per se* approach to plain-error review is flawed. An error, of course, must be more than obvious or readily apparent in order to trigger appellate review under Federal Rule of Criminal Procedure 52(b). Following decisions such as *United States* v. *Frady, United States* v. *Socony-Vacuum Oil Co., supra,* and *United States* v. *Atkinson,* federal courts have consistently interpreted the plain-error doctrine as requiring an appellate court to find that the claimed error not only seriously affected "substantial rights," but that it had an unfair prejudicial impact on the jury's deliberations. Only then would the court be able to conclude that the error undermined the fairness of the trial and contributed to a miscarriage of justice. To do otherwise could well lead to having appellate courts indulge in the pointless exercise of reviewing "harmless plain errors"—a practice that is contrary to the draftsmen's intention behind Rule 52(b), see n. 12, *supra,* and one that courts have studiously avoided and commentators have properly criticized, see, *e. g.,* 8B J. Moore, *supra,* § 52.02[2], at 52–3 to 52–4; 3A C. Wright, Federal Practice and Procedure § 856, p. 344 (2d ed. 1982). It should be noted that the Tenth Circuit seems to have retreated from its position that improper prosecutorial remarks are *per se* "plain error." *Mason* v. *United States,* 719 F. 2d 1485, 1489–1490 (1983).

prosecution's integrity and defense counsel's argument that the evidence established no such crime.

Finally, the prosecutor's comments that respondent had not acted with "honor and integrity," and his calling attention to the jury's responsibility to follow the court's instructions were in response to defense counsel's rhetoric that respondent alone was the sole honorable actor in "this whole affair," *id.*, at 547, and that the jury should not find respondent guilty simply because he could not understand applicable, but complex, federal regulations. The prosecutor was also in error to try to exhort the jury to "do its job"; that kind of pressure, whether by the prosecutor or defense counsel, has no place in the administration of criminal justice, see, *e. g.*, ABA Standards for Criminal Justice 3–5.8(c) and 4–7.8(c). Given the context of the prosecutor's remarks and defense counsel's broadside attack, however, we conclude that the jury was not influenced to stray from its responsibility to be fair and unbiased.[15]

The concerns underlying our reactions against improper prosecutorial arguments to the jury are implicated here, but not to the extent that we conclude that the jury's deliberations were compromised. The prosecutor's vouching for the credibility of witnesses and expressing his personal opinion concerning the guilt of the accused pose two dangers: such comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence. See *Berger* v. *United States*, 295 U. S., at 88–89.

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[15] The jury acquitted respondent of the most serious charge he faced, interstate transportation of stolen property. This reinforces our conclusion that the prosecutor's remarks did not undermine the jury's ability to view the evidence independently and fairly.

The prosecutor's statement of his belief that respondent intended to commit a fraud contained no suggestion that he was relying on information outside the evidence presented at trial. He supported his comment by referring to respondent's own testimony that Compton received 85 cents a barrel for its deliveries to Apco and that respondent personally received a bonus of one percent of Compton's net profits, see Tr. 501–503; he then summarized portions of the evidence adduced at trial before suggesting to the jury that the record established the fraud charged. Although it was improper for the prosecutor to express his personal opinion about respondent's guilt, see *Berger* v. *United States*, *supra*, at 88; ABA Standard for Criminal Justice 3–5.8(b), when viewed in context, the prosecutor's remarks cannot be read as implying that the prosecutor had access to evidence outside the record. The jury surely understood the comment for what it was—a defense of his decision and his integrity—in bringing criminal charges on the basis of the very evidence the jury had heard during the trial.

Finally, the overwhelming evidence of respondent's intent to defraud Apco and submit false oil certifications to the Government eliminates any lingering doubt that the prosecutor's remarks unfairly prejudiced the jury's deliberations or exploited the Government's prestige in the eyes of the jury. Not a single witness supported respondent's asserted defense that fuel oil mixed with condensate could be certified and sold as crude oil, and several witnesses flatly rejected such a proposition, see Tr. 352–353, 393–395. Indeed, respondent's crude oil trader testified that he had never heard of a firm legally blending fuel oil with condensate and stating that the mixture was crude oil. See *id.*, at 359. It was undisputed that respondent failed to advise Apco of what he was actually supplying and that the oil supplied did not meet the contract requirements. See *id.*, at 358–359.

Moreover, the evidence established beyond any doubt whatever that respondent deliberately concealed his scheme to defraud Apco. Apart from enlisting the aid of an oil brokerage firm to "recertify" the fuel oil as crude oil, respondent on three separate occasions, when questioned by two Apco officials and by FBI agents, falsely denied that he was supplying fuel oil instead of crude oil, see *id.*, at 293–294, 357–358, 379, 496, 516. Under these circumstances, the substantial and virtually uncontradicted evidence of respondent's willful violation provides an additional indication that the prosecutor's remarks, when reviewed in context, cannot be said to undermine the fairness of the trial and contribute to a miscarriage of justice.

V

On this record, we hold that the argument of the prosecutor, although error, did not constitute plain error warranting the Court of Appeals to overlook the failure of the defense counsel to preserve the point by timely objection; nor are we persuaded that the challenged argument seriously affected the fairness of the trial. Accordingly, the judgment of the Court of Appeals, ordering a new trial based on the prosecutor's argument, is reversed.

It is so ordered.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join, concurring in part and dissenting in part.

In his rebuttal argument to the jury, the prosecutor from the Criminal Fraud Section of the United States Department of Justice in Washington, D. C., (1) repeatedly stated his personal opinion that the respondent Billy G. Young was guilty of fraud, (2) used his prosecutorial "experience in these matters" in discussing the consequences of Young's conduct, and (3) admonished the jurors that, if they voted to acquit, they would not be "doing your job as jurors." App. 8–11. The Government would justify the prosecutor's remarks as "invited" by the defense counsel's own improper arguments. In reversing Young's conviction, the Court of Appeals for the Tenth Circuit rejected this justification and emphasized that "'[w]e can give no comfort to the proposition that unprofessional conduct upon the part of defense counsel opens the door to similar conduct by government counsel.'" 736 F. 2d 565, 570 (1983), quoting *United States* v. *Ludwig*, 508 F. 2d 140, 143 (CA10 1974). Accordingly, the Court of Appeals held that "improper conduct on the part of opposing counsel should be met with an objection to the court, not a similarly improper response." 736 F. 2d, at 570.

This surely is a sensible conclusion and falls well within the authority of the courts of appeals to define reasonable rules of courtroom conduct. Because Young's counsel did not object to the prosecutor's misconduct, however, a reversal was proper only if the misconduct constituted plain error under Federal Rule of Criminal Procedure 52(b)—that is, if it either (1) had a prejudicial impact on the verdict when viewed in the context of the trial as a whole, or (2) "seriously affect[ed] the . . . integrity or public reputation of [the] judicial proceedings." *United States* v. *Atkinson*, 297 U. S. 157, 160 (1936); see also *United States* v. *Frady*, 456 U. S. 152, 163, n. 11 (1982); *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 239 (1940). The Court of Appeals noted the contours of this inquiry, and its opinion could perhaps be read as implicitly concluding that the prosecutor's misconduct substantially prejudiced the outcome of the trial or seriously affected the integrity of the proceedings. The court did not address the application of the plain-error standard to the facts of this case, however, but instead cryptically concluded that the challenged remarks "speak for themselves" and constituted "plain error." 736 F. 2d, at 570. Accordingly, I would remand the case to the Court of Appeals for a proper plain-error inquiry.[1]

This analysis leads me to concur in much of the Court's opinion. Specifically, I agree fully with the Court's conclusion that federal prosecutors do not have a "right" of reply to defense improprieties, but must instead object to the trial judge and request curative action. Moreover, I join with the Court in concluding that federal courts may set reasonable rules of rhetorical conduct and that prosecutorial violations of such rules constitute error. And I concur that the judgment below cannot stand. However, I must respectfully but completely disagree with two other aspects of the Court's resolution of this case. First, the Court appears to adopt an "invited error" analysis, under which it only grudgingly acknowledges that the prosecutor acted improperly in this case. This approach leads the Court to minimize the gravity of the prosecutor's gross misconduct. Second, instead of remanding this case to the Court of Appeals, the Court reaches out to conduct the plain-error inquiry on its own. Even if the Court's conclusion is correct—and I have substantial misgivings about the thoroughness of the Court's analysis—I believe this unexplained departure from our usual practice misconceives the Court's institutional role and constitutes poor judicial administration.

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[1] The Tenth Circuit's statement that the prosecutor's remarks were "sufficiently egregious as to constitute plain error" could be read as concluding that the evidence of Young's guilt was not overwhelming. 736 F. 2d, at 570. Similarly, the Tenth Circuit's pointed discussion about the frequency with which "[t]he issue has come before this Court . . . in recent years" could be construed as suggesting that the Government's recurrent violations have seriously threatened the integrity of courtroom proceedings in that Circuit. *Ibid.* Although these are possible readings of the opinion below, the societal costs of reversing a conviction and requiring a retrial justify the requirement that an appellate court discuss the basis of its reasoning that prosecutorial misconduct is sufficiently egregious as to constitute plain error. Cf. *United States* v. *Hasting*, 461 U. S. 499, 528 (1983) (BRENNAN, J., concurring in part and dissenting in part) (courts should exercise supervisory powers to reverse convictions "only after careful consideration, and balancing, of all the relevant interests"). This Court's primary function is to ensure that such considered evaluation has been conducted by the court below. See *infra*, at 30–31, 33–35.

I

This Court only infrequently gives plenary consideration to cases involving standards of prosecutorial conduct. When we do, it is important that we attempt to set forth with clarity the standards by which federal prosecutors must guide their trial conduct.

A

The Court granted the Government's petition for a writ of certiorari to resolve, *inter alia*, the question "[w]hether a prosecutor may rebut [improper] closing defense argument . . . by responsive argument that would be inappropriate in the absence of such provocation." Pet. for Cert. (I). The Government contends that we should recognize "a prosecutor's right to respond" to improper defense arguments and that, in light of this "right," we should hold that such responses "are not improper" even if standing alone they would be impermissible. Brief for United States 15–16.

Today the Court rejects this asserted "right" of reply, emphasizing instead that prosecutors have no "license to make otherwise improper arguments" in response to defense rhetoric, *ante*, at 12, and holding that the prosecutor's responses in this case "constituted error," *ante*, at 14. See also *ante*, at 12 (rejecting "judicial approval—or encouragement—of response-in-kind"), 14, 16–20. As the Court observes, "[c]learly two improper arguments—two apparent wrongs—do not make for a right result." *Ante*, at 11. Instead, the Court instructs, the proper recourse is an objection to the trial judge and "prompt action from the bench in the form of corrective instructions to the jury, and when necessary, an admonition to the errant advocate." *Ante*, at 13.[2]

The Court today also reaffirms the authority of lower courts to define and enforce reasonable rules of prosecutorial conduct.[3] As the Court notes, the prosecutor in this case departed from Tenth Circuit precedents requiring prosecutors to object to defense misconduct rather than respond in kind; this action in and of itself "constituted error." *Ante*, at 14.

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[2] In its 39-page brief, the Government devotes just one footnote in its effort to demonstrate the unreasonableness of requiring prosecutors to object to defense misconduct rather than according them a "right" of reply. See Brief for United States 23, n. 18: "We do not believe that the alternative proposed by the court of appeals (Pet. App. 11a)—objecting to an improper defense argument and requesting an instruction to the jury to disregard that argument—is sufficient to dispel the unfairness engendered by an argument like respondent's here. Such an instruction would not answer the factual assertion of prosecutorial hypocrisy that was made here." As the Court notes today, however, an objection followed by admonition or instruction is typically presumed to be sufficient to dispel prejudice. *Ante*, at 13. This presumption surely applies to the United States Government as well as to the accused.

[3] We have long recognized that the courts of appeals may prescribe rules of conduct and procedure to be followed by district courts within their respective jurisdictions. In *Cupp* v. *Naughten*, 414 U. S. 141, 146 (1973), for example, the Court observed that within the federal system an "appellate court will, of course, require the trial court to conform to constitutional mandates, but it may likewise require it to follow procedures deemed desirable from the viewpoint of sound judicial practice although in nowise commanded by statute or by the Constitution." And in *Donnelly* v. *DeChristoforo*, 416 U. S. 637, 648, n. 23 (1974), the Court emphasized that "appellate courts, by proper exercise of their supervisory authority," should "discourage" prosecutorial misconduct. See also *Bartone* v. *United States*, 375 U. S. 52, 54 (1963) *(per curiam)* (courts of appeals have "broad powers of supervision" over federal proceedings); *Mesarosh* v. *United States*, 352 U. S. 1, 14 (1956); *McNabb* v. *United States*, 318 U. S. 332, 340 (1943) ("Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence").

B

I fully agree with these conclusions. The Court goes on to suggest, however, that courts should apply an "invited error" analysis in determining the consequences of prosecutorial violations of these standards. Under this analysis, courts not only should determine the possible effect of the misconduct "on the jury's ability to judge the evidence fairly," but also should consider (1) "[d]efense counsel's conduct," and (2) whether the prosecutor "responded reasonably" under the circumstances. *Ante*, at 12. The conclusion is that prosecutorial misconduct, if "invited" by defense misconduct, will be excused if it "did no more than respond substantially in order to 'right the scale.'" *Ante*, at 12–13. See also *ante*, at 14.

I believe the Court's "invited error" analysis is critically flawed: it overlooks the ethical responsibilities of federal prosecutors and threatens to undercut the prohibition of prosecutorial misconduct in the first place. In addition, the Court's analysis is misapplied to the facts of this case.

To begin with, while the Court correctly observes that both sides are subject to ethical rules of rhetorical conduct, it fails completely to acknowledge that we have long emphasized that a representative of the United States Government is held to a *higher* standard of behavior:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. . . .
>
> ". . . Consequently, improper suggestions, insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none." *Berger* v. *United States*, 295 U. S. 78, 88 (1935).

Accord, *Viereck* v. *United States*, 318 U. S. 236, 248 (1943). Cf. ABA Model Rules of Professional Conduct, Rule 3.8 comment (1984) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate"); ABA Model Code of Professional Responsibility EC 7–13 (1980) (prosecutor owes a "special duty"); ABA Standard for Criminal Justice 3–5.8, p. 3·88 (2d ed. 1980). I believe the Court trivializes these high standards by suggesting that a violation may be overlooked merely because the prosecutor decided *sua sponte* that he had to "right the scale."[4]

Moreover, the Court's suggestion that lower courts should evaluate prosecutorial misconduct to determine whether it was "reasonabl[e]" and "necessary to 'right the scale,'" *ante*, at 12, 14, is palpably inconsistent with the Court's conclusion that such misconduct "constitute[s] error." *Ante*, at 14; see also *ante*, at 11, 14, 16–20. As the Court observes, prosecutorial rhetoric of the sort in this case has "no place in the administration of justice and should neither be permitted nor rewarded." *Ante*, at 9. Such errors in appropriate cases might be determined to be harmless, but it is a contradiction in terms to suggest they might be "reasonabl[e]" or "necessary to 'right the scale.'" *Ante*, at 12, 14.

There was certainly nothing "reasonabl[e]" in this case about the prosecutor's responses to the concededly improper defense arguments. The defense counsel's most serious assertion was that the prosecutor did not believe Young had intended to defraud Apco.[5] The prosecutor's initial statement that he personally believed that Young had indeed intended to defraud Apco, while itself error, see *ante,* at 16–18, might be characterized as falling within the bounds of restrained reply.[6] But the prosecutor was not content to leave matters there. First, he repeatedly emphasized his personal opinion that Young was guilty of fraud.[7] Second, he made predictions about the continuing effects of Young's conduct based on his prosecutorial "experience in these matters."[8] Third, he warned the jurors that they would not be "doing your job as jurors" if they failed to convict Young.[9]

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[4] Excusing a federal prosecutor's courtroom misconduct merely on the ground that the prosecutor was responding to his adversary suggests, it seems to me, that a trial is something like a schoolyard brawl between two children. Such an excuse smacks of the "sporting theory of justice," a theory long recognized as "only a survival of the days when a lawsuit was a fight between two clans." Pound, The Causes of Popular Dissatisfaction with the Administration of Justice, 29 A. B. A. Rep. 395, 404–406 (1906). If unethical arguments by the prosecutor in response to defense remarks constitute error, as the Court concedes, it is unclear why the error should be excused because the prosecutor wanted to "right the scale."

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[5] "The indictment says that Billy Young is charged with intending to devise a scheme to defraud Apco and to obtain money and property by false and fraudulent pretenses. And I submit to you that there's not a person in this courtroom including those sitting at this table who think that Billy Young intended to defraud Apco." App. 5. The defense counsel also argued that the Government had tried the case "unfairly," and that Young was "the only one in this whole affair that has acted with honor and with integrity." *Id.,* at 4–7.

[6] "I think he said that not anyone sitting at this table thinks that Mr. Young intended to defraud Apco. Well, I was sitting there and I think he was." *Id.,* at 8.

[7] "I think he got 85 cents a barrel for every one of those 117,250.91 barrels he hauled and every bit of the money they made on that he got one percent of. So, I think he did. If we are allowed to give our personal impressions since it was asked of me. . . . I don't know what you call that, I call it fraud. You can look at the evidence and you can remember the testimony, you remember what they said and what he admitted they said. I think it's a fraud. . . . That's the whole point of the prosecution, it was a fraud." *Id.,* at 8–9.

[8] "He said—Mr. Bailey said Apco didn't lose, says doesn't think anyone will come back. Well, what he thinks they won't come back but my experience in these matters is when the government does something like this they're going to come back. All that money that Apco got for this stripper and new oil, Al Green at the Apco trust he's going to get some kind of invoices. That's what I think." *Id.,* at 10.

[9] "I don't know whether you call it honor and integrity, I don't call it that, Mr. Bailey does. If you feel you should acquit him for that it's your pleasure. I don't think you're doing your job as jurors in finding facts as

These arguments, which separately and cumulatively so clearly violated the disciplinary rules of our profession,[10] deserve stern and unqualified judicial condemnation. Yet the Court reserves the force of its ire for criticism of the *defense* counsel's behavior: the Court castigates the defense counsel's "attacks," "opening salvo," "going 'out of bounds,'" "misconduct," "obviously vulnerable" position, "obvious misconduct," "accusation[s]," "acerbic charge[s]," "breach of ethical standards," "improper assertion[s]," "repeated attacks," and "broadside attack[s]." *Ante*, at 12, 13, 14, 17, 18. In comparison, the Court appears only reluctantly to concede that "we agree that the prosecutor's response constituted error" because his remarks were "inappropriate," "should not have been made," and were "not necessary." *Ante*, at 14, 16, 17. This disparity of tone illustrates one of the major abuses of the "invited error" doctrine, an abuse often noted by the commentators.[11] Rather than apply the doctrine as a

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opposed to the law that this Judge is going to instruct you, you think that's honor and integrity then stand up here in Oklahoma courtroom and say that's honor and integrity; I don't believe it." *Id.*, at 10–11.

[10] See, *e. g.*, ABA Model Code of Professional Responsibility DR 7–106(C) (1980), stating in relevant part:

"In appearing in his professional capacity before a tribunal, a lawyer shall not:

. . . . .

"(3) Assert his personal knowledge of the facts in issue, except when testifying as a witness.

"(4) Assert his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but he may argue, on his analysis of the evidence, for any position or conclusion with respect to matters stated herein."

See also ABA Model Rules of Professional Conduct, Rule 3.4(e) (1984) (incorporating standards set forth above); ABA Standards for Criminal Justice 3–5.8(b) (2d ed. 1980) ("It is unprofessional conduct for the prosecutor to express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant").

[11] See, *e. g.*, J. Stein, Closing Argument—The Art and the Law § 88 (1982); Alschuler, Courtroom Misconduct by Prosecutors and Trial Judges,

limited corrective, courts frequently employ it as a rule of unclean hands that altogether prevents a defendant from successfully challenging prosecutorial improprieties. Such use of the doctrine results, as it has today, in minimizing the gravity of virtually unchecked prosecutorial appeals going far beyond a "fair" response to the defense counsel's arguments.[12]

In further support of its analysis, the Court contends that while the underlying "concerns" of the legal and ethical strictures against improper prosecutorial arguments "are implicated here," they are not implicated in a serious way. *Ante*, at 18. The Court maintains, for example, that the prosecutor's arguments "contained no suggestion that he was relying on information outside the evidence presented at trial." *Ante*, at 19. I doubt very much, however, that the prosecutor ever testified or presented evidence about "my experience in these matters." App. 10. Moreover, the proscription against prosecutorial assertions of personal belief is obviously not concerned solely with references to nonrecord evidence. As the Court itself recognizes, "the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence." *Ante*, at 18. Thus "improper suggestions, insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none." *Berger* v. *United States*, 295 U. S., at 88.[13] The

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50 Texas L. Rev. 629, 657–658 (1972); Crump, The Function and Limits of Prosecution Jury Argument, 28 Sw. L. Rev. 505, 531–533 (1974).

[12] Under this sort of application of the invited-response rule, "[t]he prosecutor may deduce . . . that he would do well to watch carefully for certain mistakes that the defense counsel may make, and, instead of objecting if that course is open to him, attempt to take advantage of that mistake . . . ." Comment, Limitations Upon the Prosecutor's Summation to the Jury, 42 J. Crim. L., C. & P. S. 73, 81 (1951).

[13] See also *United States* v. *Bess*, 593 F. 2d 749, 755 (CA6 1979) ("Implicit in [a prosecutor's] assertion of personal belief that a defendant is

Court today acknowledges these risks, but then decrees that the prosecutor's assertions in this case cannot be construed as having "exploited the Government's prestige in the eyes of the jury." *Ante*, at 19. This cavalier assertion is wholly at odds with a longstanding presumption to the contrary, see *Berger* v. *United States*, *supra*, and the Court should at least provide a more reasoned basis for this striking departure.

Similarly, the prosecutor's admonition that the jurors would not be "doing your job as jurors" if they voted to acquit was neither invited nor excusable, as the Court concedes. *Ante*, at 18. Many courts historically have viewed such warnings about not "doing your job" as among the most egregious forms of prosecutorial misconduct. See, *e. g.*, Annot., 85 A. L. R. 2d 1132 (1962 and Supp. 1979). How possibly, then, can the Court characterize remarks such as these as a "defense" by the prosecutor "of his decision and his integrity in bringing criminal charges"? *Ante*, at 19.

II

Although Young's counsel did not object to the prosecutor's arguments, those arguments nevertheless constitute plain error that require reversal of Young's conviction if they may be said either (1) to have created an unacceptable danger of prejudicial influence on the jury's verdict, or (2) to have "seriously affect[ed] the . . . integrity or public reputation of [the] judicial proceedings." *United States* v. *Atkinson*, 297 U. S., at 160. The Tenth Circuit did not address the application of these standards to the facts of this case, see n. 1, *supra*, reversing instead simply on its conclusory finding that the prosecutor committed "plain error."

When we detect legal error in a lower court's application of the plain-error or harmless-error rules, as here, the proper

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guilty, is an implied statement that the prosecutor, by virtue of his experience, knowledge and intellect, has concluded that the jury must convict. The devastating impact of such 'testimony' should be apparent").

course is to set forth the appropriate standards and then remand for further proceedings. We have followed this procedure in countless cases.[14] But the Court today reaches out without explanation and inappropriately decides the issue itself. Its analysis is flawed in several respects, and these flaws demonstrate the wisdom of leaving such inquiries in the first instance to the lower courts.

First, the Court's conclusion that the prosecutor's arguments could not have prejudiced Young rests in large part on its "invited error" analysis. The gravamen of its reasoning apparently is that, since the defense misconduct supposedly canceled out much of the prosecutor's excesses, the prosecutor's remarks were tied to the record evidence, and the jurors "surely understood" the prosecutor's rhetoric "for what it was," the prosecutor's unethical behavior could not likely have had a prejudicial impact on the jurors' deliberations. *Ante*, at 19. I have already demonstrated the fallacy of these underlying premises.

Second, the plain-error inquiry necessarily requires a careful review of the entire record to determine the question of possible prejudice. The Court in two brief paragraphs summarizes its review of the record and proclaims that the evidence of Young's guilt was "overwhelming" and supported the conviction "beyond any doubt whatever." *Ante*, at 19, 20. The Court invokes a curious analysis in support of this pronouncement: the fact that the jury acquitted Young on

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[14] See, *e. g.*, *Kentucky* v. *Whorton*, 441 U. S. 786, 789–790 (1979) *(per curiam)*; *Moore* v. *Illinois*, 434 U. S. 220, 232 (1977); *Moore* v. *United States*, 429 U. S. 20, 23 (1976) *(per curiam)*; *Coleman* v. *Alabama*, 399 U. S. 1, 11 (1970); *Foster* v. *California*, 394 U. S. 440, 444 (1969); *Gilbert* v. *California*, 388 U. S. 263, 274 (1967); *United States* v. *Wade*, 388 U. S. 218, 242 (1967); *Ferguson* v. *United States*, 375 U. S. 962 (1964) (order). See also *Connecticut* v. *Johnson*, 460 U. S. 73, 102 (1983) (POWELL, J., dissenting) (question of an error's possible prejudice is "[n]ormally . . . a question more appropriately left to the courts below," in part because "[t]here may be facts and circumstances not apparent from the record before us").

"the most serious charge he faced . . . reinforces our conclusion that the prosecutor's remarks did not undermine the jury's ability to view the evidence independently and fairly." *Ante*, at 18, n. 15. If the evidence against Young was so "overwhelming," it is difficult to perceive why the jury would have returned a partial acquittal. The jury's decision can just as naturally be interpreted to suggest that the evidence was close and the verdict a compromise, thus supporting a belief that the prosecutor's assertion of personal knowledge and his exhortation to "do your job" did in fact have a prejudicial impact. Moreover, the Court minimizes the fact that mail fraud and the making of false statements are specific-intent crimes and that good faith therefore stands as a complete defense. See, *e. g.*, *United States* v. *Martin-Trigona*, 684 F. 2d 485, 492 (CA7 1982) (mail fraud); *United States* v. *Lange*, 528 F. 2d 1280, 1287–1288 (CA5 1976) (false statements). The question of Young's specific intent to defraud necessarily turned on witness credibility, and in this context the prosecutor's misconduct may well have had a prejudicial impact on the jurors' deliberations. Although the Court is surely correct in emphasizing the impropriety of the crude oil condensate blending scheme that Young participated in, there was significant evidence that, if believed, might well have suggested Young's innocent though ignorant motives.[15]

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[15] Young's defense was that he believed that the blending of crude oil condensate with Number 4 fuel oil, an "unfinished" oil under Government regulations, would yield a blend that could still properly be certified as "crude" under then-extant regulations. Young maintained that Kenneth Ross, then an officer at Prime Resources Corporation, had convinced him that such certification was permissible. Tr. 78, 514. Ross denied that he had so persuaded Young, and the dispute turned on the jurors' credibility determinations. There was substantial testimony from Government witnesses that the blending of crude oil condensate with other oil was a common industry practice, albeit not the blending of condensate with fuel oil. *Id.*, at 55, 59, 69, 361, 392. There was also testimony that the highest-quality crude condensate, when mixed with Number 4 fuel oil, yielded a blend superior to some lower-quality crudes. *Id.*, at 55–56, 384, 427. Moreover, Apco received this blend for seven months, tested it, and

Third, the Court altogether fails to consider whether the prosecutor's gross misconduct and flouting of the professional canons "seriously affect[ed] the . . . integrity or public reputation of [the] judicial proceedings." *United States* v. *Atkinson*, 297 U. S., at 160; see also *United States* v. *Frady*, 456 U. S., at 162, n. 11; *Brasfield* v. *United States*, 272 U. S. 448, 450 (1926). From the citations in the Tenth Circuit's opinion, see 736 F. 2d, at 570, it would appear that prosecutorial improprieties of the sort committed in this case may present a recurring problem. This Court is in no position at this time to pass judgment on the gravity of the problem and the panel's apparent concern that the prosecutor's misconduct in this case compromised the integrity and public reputation of the Circuit's administration of justice. Clearly a remand to address the question is necessary.[16]

These deficiencies in the Court's plain-error analysis reinforce the conviction that it was poor judicial administration

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reported no untoward results; it was only when another company attempted to pass off unadulterated low-quality fuel oil that Apco became concerned. *Id.*, at 364–366, 412. Young, who had an eighth-grade education, maintained that he had thought Government regulations permitted his manner of certification; Government witnesses agreed that it was difficult to "make a lick of sense" out of the complex standards. *Id.*, at 367. Finally, Government witnesses themselves testified that they did not believe that Young had intended to defraud Apco, that many others had been aware of the scheme, and that others had taken advantage of Young. *Id.*, at 57–58, 78–80.

[16] The Court suggests that plain error may be found *only* where the error "had an unfair prejudicial impact on the jury's deliberations." *Ante*, at 17, n. 14. Plain error also may be grounded, however, on those errors that "seriously affect the . . . integrity or public reputation of [the] judicial proceedings." *United States* v. *Atkinson*, 297 U. S. 157, 160 (1936). I believe that certain extreme circumstances, such as egregious misbehavior or a pattern and practice of intentional prosecutorial misconduct that has not been deterred through other remedies, may well so seriously undermine the integrity of judicial proceedings as to support reversal under the plain-error doctrine. Cf. *United States* v. *Hasting*, 461 U. S., at 527 (BRENNAN, J., concurring in part and dissenting in part) (supervisory powers).

for the Court to embark on its inquiry in the first place. Our traditional practice has been to leave fact-bound questions of possible prejudicial error to the lower courts on remand. See *supra*, at 30–31, and n. 14. Two important considerations undergird this practice. First, the function of this Court is not primarily to correct factual errors in lower court decisions, but instead to resolve important questions of federal law and to exercise supervisory power over lower federal courts. Our institutional role properly is focused on ensuring clarity and uniformity of legal doctrine, and not on the case-specific process of reviewing the application of law to the particularized facts of individual disputes—one of the functions performed quite capably by the federal courts of appeals. This allocation of responsibilities can result in subtle but vitally important differences in institutional outlook, differences that should not be shortcut simply because a majority decides the evidence of a particular defendant's guilt is "overwhelming" and "established beyond any doubt whatever." *Ante*, at 19, 20.

Second, if the Court is to be evenhanded in its willingness to review lower courts' plain-error and harmless-error determinations, we will be required to undertake such analyses with ever-increasing frequency. Yet this Court simply is not institutionally capable of conducting the sort of detailed record analyses required in properly administering the plain-error and harmless-error doctrines.

> "This Court is far too busy to be spending countless hours reviewing trial transcripts in an effort to determine the likelihood that an error may have affected a jury's deliberations. . . . As a practical matter, it is impossible for any Member of this Court to make the kind of conscientious and detailed examination of the record that should precede a determination that there can be no reasonable doubt that the jury's deliberations as to [the] defendant were not affected by the alleged error. And it is an insult to the Court of Appeals to imply, as the

> Court does today, that it cannot be trusted with a task that would normally be conducted on remand." *United States* v. *Hasting*, 461 U. S. 499, 516–517 (1983) (STEVENS, J., concurring in judgment).

Surely the Court's time could have been better spent than on familiarizing ourselves in this case with the details of crude-oil refining and blending processes; the relative gravities and qualities of sweet crude, crude-oil condensate, and Number 4 fuel oil; long-rescinded Government regulations; various oil-industry testing procedures; and the complex of companies and individuals with whom Billy G. Young interacted—matters that are all important to a fair evaluation of Young's defense, but that necessarily are limited to the facts of this isolated case.

JUSTICE STEVENS, dissenting.

In *Namet* v. *United States*, 373 U. S. 179 (1963), the Court recognized that even in the absence of an objection, trial error may require reversal of a criminal conviction on either of two theories: (1) that it reflected prosecutorial misconduct, or (2) that it was obviously prejudicial to the accused. *Id.*, at 186–187. In that case, after determining that the challenged error did not satisfy either standard, *id.*, at 188–189, the Court concluded that it saw "no reason to require such extravagant protection against errors which were not obviously prejudicial and which the petitioner himself appeared to disregard." *Id.*, at 190.[1] It therefore affirmed the judgment of the Court of Appeals in that case.

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[1] The Court appended the following footnote:

"Finding, as we do, that this case involves neither misconduct by the prosecution nor inferences of material importance, we need not pass upon the holding in *United States* v. *Maloney*, [262 F. 2d 535 (CA2 1959)], that a failure to give proper curative instructions when such elements are present constitutes plain error." 373 U. S., at 190, n. 10.

See also *Henderson* v. *Kibbe*, 431 U. S. 145, 154, n. 12 (1977).

In this case the Court has unanimously concluded that the prosecutor's response to defense counsel's closing argument constituted error.[2] It has thus decided against the Government the principal question that its petition for a writ of certiorari presented.[3] The Court has also unanimously concluded that "the prosecutor's comments crossed the lines of permissible conduct established by the ethical rules of the legal profession." *Ante*, at 14; see also *ante*, at 25–26 (BRENNAN, J., joined by MARSHALL and BLACKMUN, JJ., concurring in part and dissenting in part). Thus, at least one of the elements that was absent in *Namet* is present here.

With respect to the second element—prejudice—there is disagreement and, I submit, some confusion within the Court. The majority opinion carefully avoids denying that the prosecutorial misconduct was prejudicial to the accused. Instead, it concludes that the error did not "unfairly" prejudice the jury, *ante*, at 19, partly because the error was invited by defense counsel's misconduct and partly because the Court is convinced that respondent is guilty.[4] JUSTICE BRENNAN, on the other hand, correctly explains why this Court should permit the Court of Appeals to decide whether the error was "plain" or "harmless." He therefore would send the case back to that court to perform that task.[5]

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[2] *Ante*, at 14, 16–20; *ante*, at 26–30 (BRENNAN, J., joined by MARSHALL and BLACKMUN, JJ., concurring in part and dissenting in part).

[3] The principal question asked:

"Whether a prosecutor may rebut closing defense argument impugning the integrity of the prosecution and asserting that the prosecutors themselves do not believe in the defendant's guilt by responsive argument that would be inappropriate in the absence of such provocation."

[4] *Ante*, at 17–19. I do not, of course, suggest that it is improper for the Court to evaluate the probable impact of the error on the outcome of the case. It is important to remember, however, that the question is not whether the judge is persuaded that the defendant is guilty, but "rather what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting." *Kotteakos* v. *United States*, 328 U. S. 750, 764 (1946).

In my opinion, it is perfectly clear that the Court of Appeals has already made that determination. I do not understand how anyone could dispute the proposition that the prosecutor's comments were obviously prejudicial. Instead, the question is whether the degree of prejudice, buttressed by the legitimate interest in deterring prosecutorial misconduct, is sufficient to warrant reversal. On that question, the factor of judgment necessarily plays a critical role.[6] I am persuaded that a due respect for the work of our circuit judges, combined with a fair reading of their opinion in this case, warrants the conclusion that they have already done exactly what JUSTICE BRENNAN would have them do again.

The Court of Appeals' opinion took note of defense counsel's failure to make an objection to the improper argument, but nevertheless accepted the contention on appeal that "the prosecutor's conduct substantially prejudiced the Appellant at trial." App. to Pet. for Cert. 9a. After reviewing relevant portions of the transcript that "speak for themselves," *id.*, at 10a, and considering other Tenth Circuit cases dealing with "prejudicial statements made by the prosecution during argument to the jury," *ibid.*, the Court of Appeals expressly concluded that "the above quoted remarks were sufficiently egregious as to constitute plain error." *Ibid.* I have no doubt that the judges of the Court of Appeals for the Tenth Circuit are familiar with the difference between "harmless error" and "plain error."[7] Rather than asking those judges to supplement the opinion they have already written, I would simply affirm their judgment.

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[5] *Ante*, at 30–35 (BRENNAN, J., joined by MARSHALL and BLACKMUN, JJ., concurring in part and dissenting in part).

[6] The Court has commented on the difficulty of applying the harmless-error standard:

"This, in part, because it is general; but in part also because the discrimination it requires is one of judgment transcending confinement by formula or precise rule. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 240. That faculty cannot ever be wholly imprisoned in words, much less upon such a criterion as what are only technical, what substantial rights; and what really affects the latter hurtfully. Judgment, the play of impression and conviction along with intelligence, varies with judges and also with circumstance. What may be technical for one is substantial for another; what minor and unimportant in one setting crucial in another." *Kotteakos* v. *United States*, 328 U. S., at 761.

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[7] Rule 52 of the Federal Rules of Criminal Procedure, which is entitled "Harmless Error and Plain Error," reads as follows:

"(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

"(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court."

The note of the Advisory Committee to Rule 52(b) reads as follows:

"This rule is a restatement of existing law, *Wiborg* v. *United States*, 163 U. S. 632, 658 . . . ; *Hemphill* v. *United States*, 112 F. 2d 505, C. C. A. 9th, reversed 312 U. S. 657, . . . conformed to 120 F. 2d 115, certiorari denied 314 U. S. 627 . . . . Rule 27 of the Rules of the Supreme Court, 28 U. S. C. foll. § 354, provides that errors not specified will be disregarded, 'save as the court, at its option, may notice a plain error not assigned or specified.' Similar provisions are found in the rules of several circuit courts of appeals." 18 U. S. C. App., p. 657.

UNITED STATES *v.* DANN ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 83–1476. Argued November 5, 1984—Decided February 20, 1985

In 1951, the Shoshone Tribe sought compensation for the loss of aboriginal title to lands in several Western States. The Indian Claims Commission (Commission) entered an interlocutory order holding that aboriginal title had been extinguished and later awarded $26 million in compensation. The Court of Claims affirmed, and the award was certified to the General Accounting Office. Pursuant to 31 U. S. C. § 724a (1976 ed., Supp. V), this certification automatically appropriated the amount of the award, which was then deposited for the Tribe in an interest-bearing trust account in the United States Treasury. The Secretary of the Interior is required by statute, after consulting with the Tribe, to submit to Congress a plan for distribution of the fund, but has not yet done so, owing to the Tribe's refusal to cooperate. Subsequently, the United States brought a trespass action in Federal District Court against respondent Tribe members, alleging that in grazing livestock without a permit on land involved in the prior Commission proceeding respondents were violating certain regulations. Respondents claimed that they have aboriginal title to the land and that thus the Government was precluded from requiring grazing permits. The District Court held that aboriginal title had been extinguished when the Commission's final award was certified for payment. The Court of Appeals reversed, holding that "payment" had not occurred within the meaning of § 22(a) of the Indian Claims Commission Act, which provided that "payment of any claim [of an Indian tribe], after its determination in accordance with this [Act], shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy." The court reasoned that until a plan of distribution of the fund in question is adopted, there remain significant blocks in the way of delivery to the payee and that thus the "ordinary meaning" of payment was not satisfied.

Held: "Payment" occurred under § 22(a) when the funds in question were placed by the United States into an account in the Treasury for the Tribe. Pp. 44–50.

(a) To hold that payment under § 22(a) does not occur until a final plan of distribution has been approved by Congress would frustrate the Indian Claims Commission Act's purpose to dispose of Indian claims with finality and would also conflict with the Act's purpose of transferring from Congress to the Commission the responsibility for determining the merits of Indian claims. Pp. 45–47.

(b) To construe the word "payment" as the Court of Appeals did gives the word a markedly different meaning than it has under the general common-law rule, relied upon in *Seminole Nation* v. *United States*, 316 U. S. 286, that a debtor's payment to a fiduciary for the creditor's benefit satisfies the debt. Here, the Commission ordered the Government *qua* judgment debtor to pay $26 million to the Government *qua* trustee for the Tribe as beneficiary. Once the money was deposited into the trust account, payment was effected. Pp. 47–50.

706 F. 2d 919, reversed and remanded.

BRENNAN, J., delivered the opinion for a unanimous Court.

Assistant Attorney General McConnell argued the cause for the United States. On the briefs were *Solicitor General Lee, Assistant Attorney General Habicht, Joshua I. Schwartz, Jacques B. Gelin, Dean K. Dunsmore,* and *Robert L. Klarquist.*

John D. O'Connell argued the cause and filed a brief for respondents.*

JUSTICE BRENNAN delivered the opinion of the Court.

The question presented in this case is whether the appropriation of funds into a Treasury account pursuant to 31 U. S. C. § 724a (1976 ed., Supp. V)[1] constitutes "payment"

**William T. Finley, Jr.*, filed a brief for the American Land Title Association as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the Indian Law Resource Center by *Steven M. Tullberg* and *Robert T. Coulter;* and for the Western Shoshone National Council by *Thomas E. Luebben* and *Richard W. Hughes.*

[1] The statute provided:

"There are appropriated, out of any money in the Treasury not otherwise appropriated, such sums as may be necessary for the payment, not otherwise provided for, as certified by the Comptroller General, of final judgments, awards, and compromise settlements, which are payable in accordance with the terms of . . . awards rendered by the Indian Claims Commission . . . ."

under § 22(a) of the Indian Claims Commission Act, 60 Stat. 1055, 25 U. S. C. § 70u(a) (1976 ed.).[2]

I

This case is an episode in a longstanding conflict between the United States and the Shoshone Tribe over title to lands in the western United States. In 1951 certain members of the Shoshone Tribe sought compensation for the loss of aboriginal title[3] to lands located in California, Colorado, Idaho, Nevada, Utah, and Wyoming.[4] Eleven years later, the Indian Claims Commission entered an interlocutory order holding that the aboriginal title of the Western Shoshone had been extinguished in the latter part of the 19th century,

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[2] The statute provided:

"When the report of the Commission determining any claimant to be entitled to recover has been filed with Congress, such report shall have the effect of a final judgment of the Court of Claims, and there is authorized to be appropriated such sums as are necessary to pay the final determination of the Commission.

"The payment of any claim, after its determination in accordance with this Act, shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy."

The Indian Claims Commission was terminated on September 30, 1978, pursuant to 25 U. S. C. § 70v (1976 ed.).

[3] For a discussion of aboriginal title, see *Oneida Indian Nation* v. *County of Oneida*, 414 U. S. 661, 667 (1974); *Johnson* v. *McIntosh*, 8 Wheat. 543, 573–574 (1823); *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 17 (1831); F. Cohen, Handbook of Federal Indian Law 486–493 (1982). On the theoretical origins of aboriginal rights, see J. Scott, The Spanish Origin of International Law: Francisco de Vitoria and His Law of Nations (1934); Cohen, Spanish Origin of Indian Rights, 31 Geo. L. J. 1 (1942); Cohen, Original Indian Title, 32 Minn. L. Rev. 28 (1947).

[4] Section 2 of the Indian Claims Commission Act, 60 Stat. 1050, as amended, 25 U. S. C. § 70a (1976 ed.), authorized claims to be brought on behalf of "any Indian tribe, band, or other identifiable group of American Indians" for "claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant . . . ."

Shoshone Tribe v. *United States*, 11 Ind. Cl. Comm'n 387, 416 (1962), and later awarded the Western Shoshone in excess of $26 million in compensation. *Western Shoshone Identifiable Group* v. *United States*, 40 Ind. Cl. Comm'n 318 (1977). The Court of Claims affirmed this award.[5] *Temoak Band of Western Shoshone Indians* v. *United States*, 219 Ct. Cl. 346, 593 F. 2d 994 (1979). On December 6, 1979, the Clerk of the Court of Claims certified the Commission's award to the General Accounting Office. Pursuant to 31 U. S. C. § 724a (1976 ed., Supp. V), this certification automatically appropriated the amount of the award and deposited it for the Tribe in an interest-bearing trust account in the Treasury of the United States.

Under 25 U. S. C. § 1402(a)[6] and § 1403(a),[7] the Secretary of the Interior is required, after consulting with the Tribe, to submit to Congress within a specified period of time a plan for the distribution of the fund. In this case, the Secretary has yet to submit a plan of distribution of the $26 million owing to the refusal of the Western Shoshone to cooperate in devising the plan. The fund apparently has now grown to $43 million. Reply Brief for United States 20.

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[5] Section 20(b) of the Indian Claims Commission Act, 60 Stat. 1054, as amended, 25 U. S. C. § 70s(b) (1976 ed.), provided for an appeal to the Court of Claims from any "final determination" of the Indian Claims Commission.

[6] The statute provides:

"Within one year after appropriation of funds to pay a judgment of the Indian Claims Commission . . . , the Secretary of the Interior shall prepare and submit to Congress a plan for the use and distribution of the funds."

[7] The statute provides:

"The Secretary shall prepare a plan which shall best serve the interests of all those entities and individuals entitled to receive funds of each Indian judgment. Prior to the final preparation of the plan, the Secretary shall—

"(1) receive and consider any resolution or communication, together with any suggested use or distribution plan, which any affected Indian tribe may wish to submit to him; and

"(2) hold a hearing of record, after appropriate public notice, to obtain the testimony of leaders and members of the Indian tribe which may receive any portion, or be affected by the use or distribution, of such funds . . . ."

In 1974, the United States brought an action in trespass against two sisters, Mary and Carrie Dann, members of an autonomous band[8] of the Western Shoshone, alleging that the Danns, in grazing livestock without a permit from the United States, were acting in violation of regulations issued by the Secretary of the Interior under the authority of the Taylor Grazing Act, 43 U. S. C. § 315b.[9] The 5,120 acres at issue in the suit are located in the northeast corner of Nevada. In response to the United States' suit, the Danns claimed that the land has been in the possession of their family from time immemorial and that their aboriginal title to the land precluded the Government from requiring grazing permits. The United States District Court for the District of Nevada rejected the Danns' argument and ruled that aboriginal title had been extinguished by the collateral-estoppel effect of the Indian Claims Commission's judgment in 1962. *United States* v. *Mary and Carrie Dann*, Civil No. R–74–60 (Jan. 5, 1977). The Court of Appeals for the Ninth Circuit reversed and remanded, however, on the ground that "[w]hatever may have been the implicit assumptions of both the United States and the Shoshone Tribes during the litigation . . . , the extinguishment question was not necessarily in issue, it was not actually litigated, and it has not been decided." *United States* v. *Dann*, 572 F. 2d 222, 226–227 (1978).

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[8] See Steward, The Foundations of Basin-Plateau Shoshonean Society, in Languages and Cultures of Western North America 113, 115 (E. Swanson ed. 1970) ("'[B]and' can have no precise definition. Although it generally signifies cohesion and interaction between families that constitute a group of permanent membership, it may range in size from a few families that are closely related to many families which include some not related, or it may be structured on unilineal or bilateral principles, and interaction between the families may take many forms").

[9] The statute provides:

"The Secretary of the Interior is authorized to issue or cause to be issued permits to graze livestock on such grazing districts to such bona fide settlers, residents, and other stock owners as under his rules and regulations are entitled to participate in the use of the range, upon the payment annually of reasonable fees in each case to be fixed or determined from time to time in accordance with governing law."

On remand, the District Court held that aboriginal title was extinguished when the final award of the Indian Claims Commission was certified for payment on December 6, 1979. Civil No. R–74–60 (Apr. 25, 1980). On appeal, the Government defended the judgment of the District Court on the ground that the "full discharge" language of § 22(a) of the Indian Claims Commission Act, see n. 2, *supra*, precluded the Danns from raising the defense of aboriginal title. Although Congress had not yet approved a plan for the distribution of the funds to the Western Shoshone, the United States maintained that the requirement of "payment" under § 22(a) was satisfied by the congressional appropriation of the $26 million award into the Treasury account. The Danns argued that until Congress approved a plan for the distribution of the money to the Tribe, "payment" was not satisfied.

The Court of Appeals held that "payment" had not occurred within the meaning of § 22(a) and reversed the District Court. 706 F. 2d 919, 926 (1983). The court reasoned that until a plan of distribution was adopted by the Congress, there remained "significant legal blocks in the way of delivery to the payee," and thus the "ordinary meaning" of payment was not satisfied. We granted certiorari to resolve the question of whether the certification of the award and appropriation under § 724a constitutes payment under § 22(a). 467 U. S. 1214 (1984). We reverse.

II

The legislative purposes of the Indian Claims Commission Act and the principles of payment under the common law of trust as they have been applied to the context of relations between native American communities and the United States require that we hold that "payment" occurs under § 22(a) when funds are placed by the United States into an account in the Treasury of the United States for the Tribe pursuant to 31 U. S. C. § 724a (1976 ed., Supp. V).

A

The Indian Claims Commission Act had two purposes. The "chief purpose of the [Act was] to dispose of the Indian claims problem with finality." H. R. Rep. No. 1466, 79th Cong., 1st Sess., 10 (1945). This purpose was effected by the language of § 22(a): "When the report of the Commission determining any claimant to be entitled to recover has been filed with Congress, such report shall have the effect of a final judgment of the Court of Claims . . . ."[10] Section 22(a) also states that the "payment of any claim . . . shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy." To hold, as the court below has, that payment does not occur until a final plan of distribution has been approved by Congress would frustrate the purpose of finality by postponing the preclusive effects of § 22(a) while subjecting the United States to continued liability for claims and demands that "touch" the matter previously litigated and resolved by the Indian Claims Commission.

The second purpose of the Indian Claims Commission Act was to transfer from Congress to the Indian Claims Commission the responsibility for determining the merits of native American claims. In the course of hearings on the creation of the Indian Claims Commission, Congressman Henry Jackson, Chairman of the House Committee on Indian Affairs, made this clear:

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[10] On the finality of judgments of the Court of Claims, see 28 U. S. C. § 2519 (1976 ed.) ("A final judgment of the Court of Claims against any plaintiff shall forever bar any further claim, suit, or demand against the United States arising out of the matters involved in the case or controversy"); *United States* v. *O'Grady*, 22 Wall. 641, 647 (1875); W. Cowen, P. Nichols, & M. Bennett, The United States Court of Claims, Part II, pp. 22–25 (1978).

> ". . . [T]he very purpose of this act, the reason we are coming to Congress, is that we are being harassed constantly by various individual pieces of legislation. I do not want to act on separate legislation and Congress is being told to act on those bills, without knowing the facts, and the purpose of this legislation will be to dispose of all those routine claims and let the commission decide what the obligation is of this Government to the Indians; and, acting upon those findings made by the Commission, Congress will appropriate the money." Hearings on H. R. 1198 and H. R. 1341 before the House Committee on Indian Affairs, 79th Cong., 1st Sess., 68 (1945).

During the floor debate on the Act, Congressman Jackson observed that the House was acting in response to a study by the Brookings Institution that had concluded that "there ought to be a prompt and final settlement of all claims between the Government and its Indian citizens, and that the best way to accomplish this purpose is to set up temporarily an Indian Claims Commission which will sift all these claims, subject to appropriate judicial review, and bring them to a conclusion once and for all." 92 Cong. Rec. 5312 (1946).

Prior to the adoption of the Indian Claims Commission Act by the House of Representatives, Attorney General Clark issued the following warning:

> "The bill would provide that when the report of the Commission determining any claimant to be entitled to recover has been filed with the Congress, such report would have the effect of a final judgment to be paid in like manner as are judgments of the Court of Claims. This provision would make the Commission virtually a court with the power to determine claims based both upon legal and moral grounds rather than a fact finding body as an aid to Congress. In view of the vague basis upon which many of the claims presented to the Commission would be predicated, and the extremely novel

> character of the functions delegated to the Commission, the question is raised of whether or not the recognition of the claims should not rest finally with Congress. The provision making the findings of the Commission binding upon Congress would constitute a surrender by Congress of its very necessary prerogative to sift and control this unusual type of claim against the Government." *Id.*, at 5311 (letter to Congressman John Cochran in response to his request for the Attorney General's "views with respect to the bill (H. R. 4497) to create a Indian Claims Commission." *Id.*, at 5310).

Despite this warning, the House left the language of the Act unchanged. The Senate, however, deleted from the House bill the language that Attorney General Clark asserted would give the decisions of the Indian Claims Commission the effect of a final judgment binding upon Congress. The Conference adopted the House version "in order to make perfectly clear the intention of both houses that the determinations of the Commission should, unless reversed [by the Court of Claims], have the same finality as judgments of the Court of Claims." H. R. Conf. Rep. No. 2693, 79th Cong., 2d Sess., 8 (1946). As enacted, the Indian Claims Commission Act explicitly incorporated this standard of finality in § 22(a).

The court below justified its decision on the ground that in making "payment" turn on the submission and approval of a final plan of distribution, Congress would have one last opportunity to review the merits of claims litigated before the Indian Claims Commission. 706 F. 2d, at 927. This justification for delay obviously conflicts with the purpose of relieving Congress of the burden of having to resolve these claims.

B

Aside from its departure from the purposes of the Indian Claims Commission Act, the Court of Appeals' interpretation is in conflict with the accepted legal uses of the word "payment"—uses we assume Congress intended to adopt when it enacted § 22(a). To accept the argument of the Court of Appeals would give the word "payment" a meaning that differs markedly from its common-law meaning, which has long been applied by this Court to the relations between native American tribes and the United States.

The common law recognizes that payment may be satisfied despite the absence of actual possession of the funds by the creditor. Funds transferred from a debtor to an agent or trustee of the creditor constitute payment, and it is of no consequence that the creditor refuses to accept the funds from the agent or the agent misappropriates the funds.[11] The rationale for this is that fiduciary obligations and the rules of agency so bind the trustee or agent to the creditor (*i. e.*, the beneficiary or principal) as to confer effective control of the funds upon the creditor.

The Court has applied these principles to relations between native American communities and the United States. In *Seminole Nation* v. *United States*, 316 U. S. 286 (1942), the United States was obligated by treaty to pay annual annuities to members of the Seminole Nation. Instead, the Government transferred the money to the Seminole General Council. Members of the Tribe argued that because the

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[11] See G. Bogert, Law of Trusts and Trustees § 902 (2d rev. ed. 1982) (footnotes omitted) ("[I]t is now universally the law that the purchaser of trust property from the trustee . . . may pay the purchase money to the trustee without making any inquiry as to the use to which the trustee intends to put the money. The purchaser, in the absence of notice to the contrary, may safely assume that the price will be applied in an appropriate manner as trust property"); 4 A. Scott, Law of Trusts § 321 (3d ed. 1967); Stone, Some Legal Problems Involved in the Transmission of Funds, 21 Colum. L. Rev. 507 (1921). See also, the Uniform Fiduciaries Act § 2, 7A U. L. A. 135 (1978) ("A person who in good faith pays or transfers to a fiduciary any money or other property which the fiduciary as such is authorized to receive, is not responsible for the proper application thereof by the fiduciary; and any right or title acquired from the fiduciary in consideration of such payment or transfer is not invalid in consequence of a misapplication by the fiduciary").

Seminole General Council had misappropriated the money, the Government had not satisfied its obligation to pay the individual members of the Tribe. In disposing of the case, the Court relied upon the rule that "a third party who pays money to a fiduciary for the benefit of the beneficiary, with knowledge that the fiduciary intends to misappropriate the money or otherwise be false to his trust, is a participant in the breach of trust and liable therefor to the beneficiary." *Id.*, at 296. The Court's holding was based on its recognition of the traditional rule that a debtor's payment to a fiduciary of the creditor satisfies the debt.[12] Absent actual knowledge of the fraudulent intent of the trustee—or some other recognized exception to the general rule—the Government's payment to the Council would have discharged its treaty obligations. *Ibid.* The order remanding the case for purposes of determining whether the Government had fraudulent intent, *id.*, at 300, would have made sense only if the Court believed that, absent such knowledge, the Government's treaty obligations were discharged.

The Court's reliance on the general rule in *Seminole Nation* is authority for our holding that the United States has made "payment" under § 22(a). The final award of the Indian Claims Commission placed the Government in a dual role with respect to the Tribe: the Government was at once a judgment debtor, owing $26 million to the Tribe, and a trustee for the Tribe responsible for ensuring that the money was put to productive use and ultimately distributed in a manner consistent with the best interests of the Tribe.[13] In short, the Indian Claims Commission ordered the Government *qua* judgment debtor to pay $26 million to the Government *qua* trustee for the Tribe as the beneficiary. Once the money was deposited into the trust account, payment was effected.

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[12] The Court's acknowledgment of this general rule is apparent from its citation to 4 G. Bogert, Law of Trusts and Trustees § 901 (1935), which stated: "It is now the law that the purchaser of trust property from the trustee, where the trustee has a power to sell and has properly executed his power, may pay the purchase money to the trustee without making any inquiry as to the use to which the trustee intends to put the money. The purchaser may safely assume that the price will be applied in an appropriate manner as trust property, unless special circumstances come to his notice indicating the opposite."

III

The Danns also claim to possess individual as well as tribal aboriginal rights and that because only the latter were before the Indian Claims Commission, the "final discharge" of § 22(a) does not bar the Danns from raising individual aboriginal title as a defense in this action. Though we have recognized that individual aboriginal rights may exist in certain contexts,[14] this contention has not been addressed by the lower courts and, if open, should first be addressed below. We express no opinion as to its merits.

The judgment of the Ninth Circuit is reversed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

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[13] In suggesting that significant obstacles to the distribution of the money remain despite the transfer of the fund into a trust account, the Court of Appeals failed to recognize the legal strictures ensuring that the money will be applied to the benefit of the Tribe. We have, for example, held that the United States, as a fiduciary, is obligated to make the funds productive and is fully accountable if those funds are converted or mismanaged. See, *e. g., United States* v. *Mitchell*, 463 U. S. 206, 226 (1983); *United States* v. *Sioux Nation of Indians*, 448 U. S. 371, 408–409 (1980); *United States* v. *Shoshone Tribe*, 304 U. S. 111, 115–116 (1938); *Shoshone Tribe* v. *United States*, 299 U. S. 476, 497 (1937).

[14] *Cramer* v. *United States*, 261 U. S. 219, 227 (1923); *United States* v. *Santa Fe Pacific R. Co.*, 314 U. S. 339, 357–358 (1941); see generally Cohen, Original Indian Title, 32 Minn. L. Rev., at 53–54.

SHEA *v.* LOUISIANA

CERTIORARI TO THE SUPREME COURT OF LOUISIANA

No. 82–5920. Argued November 7, 1984—Decided February 20, 1985

After petitioner was arrested on armed robbery charges in Louisiana, he was taken to the police station for questioning by detectives. Upon being read his *Miranda* rights, he said that he did not wish to make any statement until he saw a lawyer, and the interview was then terminated. But the next day before petitioner had communicated with a lawyer, one of the same detectives, without inquiring whether petitioner had spoken with an attorney and without any indication from petitioner that he was willing to be interrogated, asked if he was willing to talk about the case. After *Miranda* rights were again read to petitioner, he orally confessed that he had committed the robberies. Over petitioner's objections the confession was admitted into evidence at his trial and he was convicted. In the meantime, subsequent to petitioner's trial and convictions and while his appeal to the Louisiana Supreme Court was pending, this Court ruled in *Edwards* v. *Arizona,* 451 U. S. 477, that a criminal defendant's rights under the Fifth and Fourteenth Amendments were violated by the use of his confession obtained by police-instigated interrogation—without counsel present—after he requested an attorney. While acknowledging the presence of an *Edwards* violation, the Louisiana Supreme Court went on to hold that *Edwards* was not to be applied to petitioner's case.

Held: The *Edwards* ruling applies to cases pending on direct appeal at the time *Edwards* was decided. Pp. 54–61.

421 So. 2d 200, reversed and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, POWELL, and STEVENS, JJ., joined. WHITE, J., filed a dissenting opinion, in which BURGER, C. J., and REHNQUIST and O'CONNOR, JJ., joined, *post,* p. 61. REHNQUIST, J., filed a dissenting opinion, *post,* p. 66.

Frances Baker Jack, by appointment of the Court, 467 U. S. 1238, argued the cause and filed a brief for petitioner.

Paul J. Carmouche argued the cause for respondent. With him on the briefs was *John A. Broadwell.*

JUSTICE BLACKMUN delivered the opinion of the Court.

In *Edwards* v. *Arizona*, 451 U. S. 477 (1981), this Court ruled that a criminal defendant's rights under the Fifth and Fourteenth Amendments were violated by the use of his confession obtained by police-instigated interrogation—without counsel present—after he requested an attorney. This case presents the issue whether that ruling is applicable to a case pending on direct appeal in a state court at the time *Edwards* was decided.

I

There is no dispute as to the facts. Petitioner Kevin Michael Shea was charged in Louisiana with two counts of armed robbery. He was arrested on July 2, 1979, and was taken to the police station at Shreveport. There he was turned over to Detectives Smith and Snell for questioning. His so-called *Miranda* rights, see *Miranda* v. *Arizona*, 384 U. S. 436 (1966), were read to him, and he signed a standard *Miranda* card. He said, however, that he did not wish to make any statement until he saw a lawyer. The interview thereupon was terminated.

The following afternoon, July 3, before petitioner had been in communication with any lawyer, Detective Snell returned. He informed petitioner that he was to be transferred from the city jail to the parish jail. Without inquiring of petitioner whether he had spoken with an attorney or whether he was indigent, and without any indication from petitioner that he now was willing to be interrogated, Snell asked if he wanted to talk about the case. Again, *Miranda* rights were read to petitioner and again he signed a *Miranda* card. He then orally confessed that he had committed the two robberies.

The charges against petitioner came on for trial in due course in the State District Court for Caddo Parish. At this point, the two counts were severed. Prior to his trial before a jury on the first count, petitioner formally moved to suppress the confession of July 3. App. 2. At the trial, which took place in 1980, the prosecution offered the confession in evidence. The defense objected, but the objection was overruled and the confession was admitted. Petitioner was convicted. He filed a like suppression motion with respect to the second charge. *Id.*, at 6. When this was denied, he withdrew his original plea and entered a plea of guilty, with a reservation under state law, see *State* v. *Crosby*, 338 So. 2d 584, 588 (La. 1976), of his right to appeal the denial of the motion to suppress. App. 7–8.

On his appeal to the Supreme Court of Louisiana, petitioner raised the issue of the trial court's error, in violation of *Miranda*, in admitting the confession. In its opinion, the Louisiana tribunal cited this Court's decision in *Edwards*, which had come down in the meantime but subsequent to petitioner's trial and convictions. The Louisiana court acknowledged the presence of an *Edwards* violation.[1] It stated:

> "In the present case it is undisputed that the police did initiate such an inquiry on July 3, after having been clearly informed by the defendant on the previous evening that he would not make any statements without counsel. Consequently, there was a violation of the additional standard governing police interrogation of a suspect imposed by *Edwards* v. *Arizona* . . . ." 421 So. 2d 200, 203 (1982).

The court, however, went on to hold that *Edwards* was not to be applied in petitioner's case:

> "As this [error] occurred before the decision in *Edwards* was rendered and we are convinced the United States

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[1] We thus are not confronted in this case with any issue as to whether petitioner had invoked his right to counsel in the first instance, see *Smith* v. *Illinois*, 469 U. S. 91 (1984), or as to whether, having done so, it was he who had initiated further conversation and interrogation, see *Oregon* v. *Bradshaw*, 462 U. S. 1039 (1983), and the several opinions therein. A violation of the *Edwards* principle, all parties here agree, took place in the instant case.

> Supreme Court will pronounce that decision is not retroactive, we so hold in this case." 421 So. 2d, at 204.

Petitioner successfully obtained a rehearing on the retroactivity issue. On rehearing, although the Louisiana Supreme Court again acknowledged, *id.*, at 210, that petitioner's confession, under *Edwards*, was not admissible, that court adhered, over two dissents, to its position that *Edwards* was not to be given retroactive effect. It stated that that decision was a "clear break with the past," was a new ruling, and was not retroactive. 421 So. 2d, at 210.

Because of the importance of the issue and because of conflicting decisions elsewhere,[2] we granted certiorari. 466 U. S. 957 (1984).

II

Edwards, the case at the center of the present controversy, involved facts startlingly similar to those of the present case. Police officers informed Edwards of his *Miranda* rights and questioned him until he said he wanted an attorney. At that point questioning ceased. The next day, however, other officers visited Edwards, stated they wanted to talk to him, informed him of his *Miranda* rights, and obtained an oral confession. This Court was positive and clear in its ruling:

> "[A]lthough we have held that after initially being advised of his *Miranda* rights, the accused may himself

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[2] See, *e. g.*, *State* v. *Brown*, 317 N. W. 2d 714, 715 (Minn. 1982); *State* v. *Taylor*, 56 Ore. App. 703, 708, 643 P. 2d 379, 382 (1982). Other courts, without addressing the retroactivity issue, have applied *Edwards* to cases pending on direct appeal when the decision was announced. See, *e. g.*, *State* v. *Platt*, 130 Ariz. 570, 575–576, 637 P. 2d 1073, 1079 (App. 1981); *People* v. *Cerezo*, 635 P. 2d 197, 199–201 (Colo. 1981); *State* v. *Brezee*, 66 Haw. 162, 657 P. 2d 1044 (1983); *State* v. *Carty*, 231 Kan. 282, 644 P. 2d 407 (1982); *People* v. *Paintman*, 412 Mich. 518, 315 N. W. 2d 418, cert. denied, 456 U. S. 995 (1982).

> validly waive his rights and respond to interrogation, . . . the Court has strongly indicated that additional safeguards are necessary when the accused asks for counsel; and we now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police" (footnote omitted). 451 U. S., at 484–485.

See also *Rhode Island* v. *Innis*, 446 U. S. 291, 298 (1980); *Fare* v. *Michael C.*, 442 U. S. 707, 719 (1979); *Michigan* v. *Mosley*, 423 U. S. 96, 104, n. 10 (1975), and *id.*, at 109–111 (opinion concurring in result); *Miranda* v. *Arizona*, 384 U. S., at 444–445, 474.

The legal principle, thus, is established and is uncontested here. The only question before us in this case is whether that ruling applies retroactively with respect to petitioner's convictions when the issue was raised and his case was pending and undecided on direct appeal in the state system at the time *Edwards* was decided.[3]

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[3] Had petitioner's case been pending here on certiorari when *Edwards* was announced, it surely would have been remanded, as were other such cases, for reconsideration in the light of *Edwards*. See *Blakney* v. *Montana*, 451 U. S. 1013 (1981); *White* v. *Finkbeiner*, 451 U. S. 1013 (1981) (on federal habeas); *Leuschner* v. *Maryland*, 451 U. S. 1014 (1981); *Monroe* v. *Idaho*, 451 U. S. 1014 (1981); *Wantland* v. *Maryland*, 451 U. S. 1014 (1981); *James* v. *Illinois*, 451 U. S. 1014 (1981). This Court's actions in 1981 in these cases indicated no conclusion on its part that *Edwards* was

III

Two of this Court's recent cases bear importantly upon the issue. The first is *United States* v. *Johnson*, 457 U. S. 537 (1982). In that case, we held that a decision of this Court concerning Fourth Amendment rights was to be applied retroactively to all convictions that were not yet final at the time the decision was rendered, except in those situations that would be clearly controlled by existing retroactivity precedents to the contrary. Specifically, the Court held that *Payton* v. *New York*, 445 U. S. 573 (1980), was to be applied retroactively to Johnson's case.

The Court in *Johnson* found persuasive Justice Harlan's earlier reasoning that application of a new rule of law to cases pending on direct review is necessary in order for the Court to avoid being in the position of a super-legislature, selecting one of several cases before it to use to announce the new rule and then letting all other similarly situated persons be passed by unaffected and unprotected by the new rule. See *Desist* v. *United States*, 394 U. S. 244, 256 (1969) (dissenting opin-

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inapplicable to other cases pending on direct review. In all six of these cases, the questioning, of course, predated *Edwards*. In *Monroe* and *Blakney*, on remand, *Edwards* was applied without discussion of retroactivity. See *State* v. *Monroe*, 103 Idaho 129, 645 P. 2d 363 (1982); *State* v. *Blakney*, 197 Mont. 131, 641 P. 2d 1045 (1982).

While not conclusive, it is of interest to note that this Court, on at least two occasions in addition to *Solem* v. *Stumes*, 465 U. S. 638 (1984), discussed *infra* in the text, already has considered *Edwards* in a retroactive setting, that is, in its application to custodial inquiries that took place before *Edwards* was decided here. See *Wyrick* v. *Fields*, 459 U. S. 42 (1982) (inquiry in 1974); *Oregon* v. *Bradshaw*, 462 U. S. 1039 (1983) (inquiry in 1980). *Bradshaw*, like the instant case, was on direct review. This Court considered and decided the *Edwards* issue in each of those cases with no comment or expressed concern about retroactivity. Our examination of the appendices and briefs in those two cases reveals that the retroactivity issue was not raised. Its underlying presence, however, was not sufficiently disturbing to cause the Court to mention it *sua sponte*.

ion); *Mackey* v. *United States*, 401 U. S. 667, 675 (1971) (separate opinion). The Court noted that, at a minimum, "'all "new" rules of constitutional law must . . . be applied to all those cases which are still subject to direct review by this Court at the time the "new" decision is handed down.'" *United States* v. *Johnson*, 457 U. S., at 548, quoting from the dissent in *Desist* v. *United States*, 394 U. S., at 258. In *Johnson* the Court, "[t]o the extent necessary to decide today's case, . . . embrace[d] Justice Harlan's views in *Desist* and *Mackey*." 457 U. S., at 562. It thus determined that unless the rule is so clearly a break with the past that prior precedents mandate nonretroactivity, a new Fourth Amendment rule is to be applied to cases pending on direct review when the rule was adopted.

In considering the retroactivity of *Payton*, the Court then concluded that the question was to be resolved fairly by applying the *Payton* ruling to all cases pending on direct review when *Payton* was decided. So to do (a) would provide a principle of decisionmaking consonant with the Court's original understanding in *Linkletter* v. *Walker*, 381 U. S. 618 (1965), and *Tehan* v. *United States ex rel. Shott*, 382 U. S. 406 (1966), (b) would comport with this Court's judicial responsibility to do justice to each litigant on the merits of his own case, and (c) would further the goal of treating similarly situated defendants similarly.

The second case is *Solem* v. *Stumes*, 465 U. S. 638 (1984). It, too, clearly involved an obvious *Edwards* violation that took place in 1973, more than seven years before *Edwards*. After Stumes' state-court conviction had been finally affirmed by the Supreme Court of South Dakota, he sought federal habeas relief. His petition for a writ, however, was denied by the Federal District Court. While Stumes' appeal was pending in the Court of Appeals, *Edwards* was decided here. The Court of Appeals then ruled that, under *Edwards*, the police had acted unconstitutionally. This

Court, by a divided vote, reversed, holding that *Edwards* was not to be applied retroactively in the *Stumes* situation. JUSTICE POWELL concurred in the judgment, 465 U. S., at 651, for he would not impose upon the State the costs that accrue by retroactive application of a new rule of constitutional law on habeas corpus; those costs, in his view, "generally far outweigh the benefits of this application." *Id.*, at 654.

The primary difference between *Johnson*, on the one hand, and *Stumes*, on the other, is the difference between a pending and undecided direct review of a judgment of conviction and a federal collateral attack upon a state conviction which has become final.[4] We must acknowledge, of course, that *Johnson* does not directly control the disposition of the present case. In *Johnson*, the Court specifically declined to address the implications of its holding for a case in a constitutional area other than the Fourth Amendment, or for a case in which a Fourth Amendment issue is raised on collateral attack.[5] 457 U. S., at 562. We now conclude, however, that there is no reason to reach in this case a result that is different from the one reached in *Johnson.* See *Mack* v. *Oklahoma,* 459 U. S. 900 (1982). There is nothing about a Fourth Amendment rule that suggests that in this context it should be given greater retroactive effect than a Fifth Amendment rule. Indeed, a Fifth Amendment violation may be more likely to affect the truth-finding process than a Fourth Amendment violation. And Justice Harlan's reasoning—that principled decisionmaking and fairness to similarly situated petitioners require application of a new rule to all cases pending on direct review—is applicable with equal force to the situation presently before us. We hold that our analysis in *Johnson* is relevant for petitioner's direct-review Fifth Amendment claim under *Edwards.* He is entitled to the benefit of the ruling in that case.

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[4] In *Solem* v. *Stumes*, the Court observed:

"At a minimum, nonretroactivity means that a decision is not to be applied in collateral review of final convictions. For purposes of this case, that is all we need decide about *Edwards*." 465 U. S., at 650.

Of course, under the rationale of our decision today, the question is whether the conviction became final before *Edwards* was decided. As we hold, if a case was pending on direct review at the time *Edwards* was decided, the appellate court must give retroactive effect to *Edwards*, subject, of course, to established principles of waiver, harmless error, and the like. If it does not, then a court conducting collateral review of such a conviction should rectify the error and apply *Edwards* retroactively. This is consistent with Justice Harlan's view that cases on collateral review ordinarily should be considered in light of the law as it stood when the conviction became final. See *Mackey* v. *United States*, 401 U.S. 667, 689 (1971) (Harlan, J., concurring in judgment). See also *Hankerson* v. *North Carolina*, 432 U.S. 233, 248 (1977) (POWELL, J., concurring in judgment). Thus, the result of our decisions concerning the retroactive applicability of the ruling in *Edwards* v. *Arizona* is fully congruent with both aspects of the approach to retroactivity propounded by Justice Harlan in his concurrence in *Mackey*.

IV

Other arguments that have been made in support of the judgment below are not persuasive. First, it is said that drawing a distinction between a case pending on direct review and a case on collateral attack produces inequities and injustices that are not any different from those that *Johnson* purported to cure. The argument is that the litigant whose *Edwards* claim will not be considered because it is presented on collateral review will be just as unfairly treated as the direct-review litigant whose claim would be bypassed were *Edwards* not the law. The distinction, however, properly rests on considerations of finality in the judicial process. The one litigant already has taken his case through the primary system. The other has not. For the latter, the curtain of finality has not been drawn. Somewhere, the closing must come. JUSTICE POWELL stressed this in his opinion concurring in the judgment in *Solem* v. *Stumes*, 465 U. S., at 653–654. He said specifically: "[I]t is particularly difficult in such cases to justify imposing upon the State the costs of collateral review. These are not insubstantial." *Id.*, at 654.

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[5] The Court in *Johnson* also declined to address situations clearly controlled by existing retroactivity precedents, such as where the new rule of law is so clear a break with the past that it has been considered nonretroactive almost automatically. Whatever the merits of a different retroactivity rule for cases of that kind may be, we have no need to be concerned with the question here. In *Solem* v. *Stumes* the Court recognized that *Edwards* was "not the sort of 'clear break' that is automatically nonretroactive." 465 U. S., at 647.

Next, it is said that the application of *Edwards* to cases pending on direct review will result in the nullification of many convictions and will relegate prosecutors to the difficult position of having to retry cases concerning events that took place years ago. We think this concern is overstated. We are given no empirical evidence in its support, and Louisiana states that any such evidence is unavailable. Brief for Respondent 11. We note, furthermore, that several courts have applied *Edwards* to cases pending on direct review without expressing concern about lapse of time or retroactivity and without creating any apparent administrative difficulty. See n. 2, *supra*. And if a case is unduly slow in winding its way through a State's judicial system, that could be as much the State's fault as the defendant's, and should not serve to penalize the defendant.

In addition, it is said that in every case, *Edwards* alone excepted, reliance on existing law justifies the nonapplication of *Edwards*. But, as we have pointed out, there is no difference between the petitioner in *Edwards* and the petitioner in the present case. If the *Edwards* principle is not to be applied retroactively, the only way to dispense equal justice to Edwards and to Shea would be a rule that confined the *Edwards* principle to prospective application unavailable even to Edwards himself.

Finally, it is said that the *Edwards* rule is only prophylactic in character and is not one designed to enhance accuracy in criminal jurisprudence. This argument, of course, is taken from *Michigan* v. *Payne*, 412 U. S. 47 (1973), where the retroactivity of *North Carolina* v. *Pearce*, 395 U. S. 711 (1969), was under consideration. The argument, we feel, is fully answered by the decision in *United States* v. *Johnson*, and by what we have said above in this opinion.

The judgment of the Supreme Court of Louisiana is reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE WHITE, with whom THE CHIEF JUSTICE, JUSTICE REHNQUIST, and JUSTICE O'CONNOR join, dissenting.

Last Term, in *Solem* v. *Stumes*, 465 U. S. 638 (1984), we held that the rule announced by the Court in *Edwards* v. *Arizona*, 451 U. S. 477 (1981), should not be applied retroactively in collateral attacks on criminal convictions. We concluded that the prophylactic purpose of the *Edwards* rule, the justifiable failure of police and prosecutors to foresee the Court's decision in *Edwards*, and the substantial disruption of the criminal justice system that retroactive application of *Edwards* would entail all indicated the wisdom of holding *Edwards* nonretroactive. Today, however, the majority concludes that notwithstanding the substantial reasons for restricting the application of *Edwards* to cases involving interrogations that postdate the Court's opinion in *Edwards*, the *Edwards* rule must be applied retroactively to all cases in which the process of direct appeal had not yet been completed when *Edwards* was decided. In so holding, the majority apparently adopts a rule long advocated by a shifting minority of Justices and endorsed in limited circumstances by the majority in *United States* v. *Johnson*, 457 U. S. 537 (1982): namely, the rule that any new constitutional decision—except, perhaps, one that constitutes a "clear break with the past"—must be applied to all cases pending on direct appeal at the time it is handed down.

Two concerns purportedly underlie the majority's decision. The first is that retroactivity is somehow an essential attribute of judicial decisionmaking, and that when the Court announces a new rule and declines to give it retroactive effect, it has abandoned the judicial role and assumed the function of a legislature—or, to use the term Justice Harlan employed in describing the problem, a "super-legislature." *Desist* v. *United States*, 394 U. S. 244, 259 (1969) (Harlan, J., dissenting). The second (and not completely unrelated) concern is fairness. It is the business of a court, the majority reasons, to treat like cases alike; accordingly, it is unfair for one litigant to receive the benefit of a new decision when another, identically situated, is denied the same benefit. The majority's concerns are no doubt laudable, but I cannot escape the conclusion that the rule they have spawned makes no sense.

As a means of avoiding what has come to be known as the super-legislature problem, the rule announced by the majority is wholly inadequate. True, the Court is not and cannot be a legislature, super or otherwise. But I should think that concerns about the supposed usurpation of legislative authority by this Court generally go more to the substance of the Court's decisions than to whether or not they are retroactive. Surely those who believe that the Court has overstepped the bounds of its legitimate authority in announcing a new rule of constitutional law will find little solace in a decision holding the new rule retroactive. If a decision is in some sense illegitimate, making it retroactive is a useless gesture that will fool no one. If, on the other hand, the decision is a salutary one, but one whose purposes are ill-served by retroactive application, retroactivity may be worse than useless, imposing costs on the criminal justice system that will likely be uncompensated for by any perceptible gains in "judicial legitimacy."

The futility of this latest attempt to use retroactivity doctrine to avoid the super-legislature difficulty is highlighted by the majority's unwillingness to commit itself to the logic of its position. For even as it maintains that retroactivity is essential to the judicial function, today's majority, like the majority in *Johnson, supra,* continues to hold out the possibility that a "really" new rule—one that marks a clear break with the past—may not have to be applied retroactively even to cases pending on direct review at the time the new decision is handed down. See *ante,* at 57 and 59, n. 5; *Johnson, supra,* at 549–550, 551–554. Of course, if the majority were truly concerned with the super-legislature problem, it would be "clear break" decisions that would trouble it the most. Indeed, one might expect that a Court as disturbed about the problem as the majority purports to be would swear off such decisions altogether, not reserve the power both to issue them and to decline to apply them retroactively. In leaving open the possibility of an exception for "clear break" decisions, the majority demonstrates the emptiness of its proposed solution to the super-legislature problem.

The claim that the majority's rule serves the interest of fairness is equally hollow. Although the majority finds it intolerable to apply a new rule to one case on direct appeal but not to another, it is perfectly willing to tolerate disparate treatment of defendants seeking direct review of their convictions and prisoners attacking their convictions in collateral proceedings. As I have stated before, see *Johnson, supra,* at 566–568 (WHITE, J., dissenting); *Williams* v. *United States,* 401 U. S. 646, 656–659 (1971) (plurality opinion), it seems to me that the attempt to distinguish between direct and collateral challenges for purposes of retroactivity is misguided. Under the majority's rule, otherwise identically situated defendants may be subject to different constitutional rules, depending on just how long ago now-unconstitutional conduct occurred and how quickly cases proceed through the criminal justice system. The disparity is no different in kind from that which occurs when the benefit of a new constitutional rule is retroactively afforded to the defendant in whose case it is announced but to no others; the Court's new approach equalizes nothing except the numbers of defendants within the disparately treated classes.

The majority recognizes that the distinction between direct review and habeas is problematic, but justifies its differential treatment by appealing to the need to draw "the curtain of finality," *ante*, at 60, on those who were unfortunate enough to have exhausted their last direct appeal at the time *Edwards* was decided. Yet the majority offers no reasons for its conclusion that finality should be the decisive factor. When a conviction is overturned on direct appeal on the basis of an *Edwards* violation, the remedy offered the defendant is a new trial at which any inculpatory statements obtained in violation of *Edwards* will be excluded. It is not clear to me why the majority finds such a burdensome remedy more acceptable when it is imposed on the State on direct review than when it is the result of a collateral attack. The disruption attendant upon the remedy does not vary depending on whether it is imposed on direct review or habeas;[1] accord-

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[1] The distinction between direct review and collateral attack may bear some relationship to the recency of the crime; thus, to the extent that the difficulties presented by a new trial may be more severe when the underlying offense is more remote in time, it may be that new trials would tend to be somewhat more burdensome in habeas cases than in cases involving reversals on direct appeal. However, this relationship is by no means direct, for the speed with which cases progress through the criminal justice system may vary widely. Thus, if the Court is truly concerned with treating like cases alike, it could accomplish its purpose far more precisely by applying new constitutional rules only to conduct of appropriately recent vintage. I assume, however, that no one would argue for an explicit "5-year rule," for example.

The notion that a new trial is a significantly less burdensome remedy when it is imposed on direct review than when it is ordered on habeas is also called into serious question by the facts of this particular case. The remedy the Court grants the petitioner is a new trial that will be held almost six years after the commission of the offense with which he is charged. I have no doubt that there are many prisoners whose convicingly, if the remedy must be granted to defendants on direct appeal, there is no strong reason to deny it to prisoners attacking their convictions collaterally. Conversely, if it serves no worthwhile purpose to grant the remedy to a defendant whose conviction was final before *Edwards*, it is hard to see why the remedy should be available on direct review.

The underlying flaw of the majority's opinion is its failure to articulate the premises on which the retroactivity doctrine it announces actually rests. In recognizing that a decision marking a clear break from the past may not be retroactive and in holding that the concern of finality trumps considerations of fairness that might otherwise dictate retroactivity in collateral proceedings, the majority implicitly recognizes that there is in fact more at issue in decisions involving retroactivity than treating like cases alike. In short, the majority recognizes that there are *reasons* why certain decisions ought not be retroactive. But the rules the majority announces fail to reflect any thoughtful inquiry into what those reasons might be. By contrast, the principles of retroactivity set forth in *Linkletter* v. *Walker*, 381 U. S. 618 (1965), and most recently applied in *Solem* v. *Stumes*, 465 U. S. 638 (1984), provide a rational framework for thinking about the question whether retroactive application of any particular decision makes sense—that is, whether the benefits of retroactivity outweigh its costs. Because the Court has already deter-

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tions were final at the time *Edwards* was decided who could be given a new trial as conveniently as petitioner.

Of course, it will be less burdensome in the aggregate to apply *Edwards* only to cases pending when *Edwards* was decided than to give it full retroactive effect; by the same token, it would be less burdensome to apply *Edwards* retroactively to all cases involving defendants whose last names begin with the letter "S" than to make the decision fully retroactive. The majority obviously would not countenance the latter course, but its failure to identify any truly relevant distinction between cases on direct appeal and cases raising collateral challenges makes the rule it announces equally indefensible.

mined that the relevant considerations set forth in *Linkletter* (the purpose of the new rule, the extent of law enforcement officials' justifiable reliance on the prior rule, and the effects on the criminal justice system of retroactivity) dictate nonretroactive application of the rule in *Edwards*, I cannot join in the majority's conclusion that that rule should be applied retroactively to cases pending on direct review at the time of our decision in *Edwards*. More importantly, I cannot concur in the approach to retroactivity adopted by today's majority—an approach that, if our precedents regarding the nonretroactivity of decisions marking a clear break with the past remain undisturbed, merely adds a confusing and unjustifiable addendum to our retroactivity jurisprudence.[2]

I respectfully dissent.

JUSTICE REHNQUIST, dissenting.

I would be willing to join the result reached by the Court in this case if the majority were willing to adopt both aspects of the approach to retroactivity propounded by Justice Harlan in his concurrence in *Mackey* v. *United States*, 401 U. S. 667, 675 (1971). Under his approach, new constitutional rules prescribed by this Court for the conduct of criminal prosecutions would apply retroactively to all cases on direct appeal at the time the new rule was announced and, with narrow exceptions, would not apply in collateral proceedings challenging convictions that had become final before the new rule was announced. I will not attempt to summarize the justifications for this approach so thoughtfully articulated by Justice Harlan.

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[2] After today, a decision that is foreshadowed—not new at all—is applicable both on direct review and in collateral proceedings. A decision that makes law that is somewhat new is to apply to all cases on direct review but will generally not be a basis for collateral relief. Really new decisions breaking with the past, however, will likely apply neither in collateral proceedings nor to cases on direct review other than that in which the decision is announced. The majority thus recognizes for purposes of retroactivity doctrine three categories of decisions: not new, newish, and brand new. I had hoped that after plenary review, we could do better than that.

Because the Court apparently is not willing to adopt in entirety Justice Harlan's bright-line distinction between direct appeals and collateral attacks, I join JUSTICE WHITE's dissent, agreeing with him that there is little logic to the Court's analysis and its rejection of the sound reasons given in *Solem* v. *Stumes*, 465 U. S. 638 (1984), for making *Edwards* v. *Arizona*, 451 U. S. 477 (1981), nonretroactive.*

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*While the results reached by the Court in this case and in *Solem* happen to be the same as they would have been under Justice Harlan's approach, the Court's analysis in *Solem* is not the same as his approach. Only JUSTICE POWELL, concurring in the judgment in *Solem*, followed the *Mackey* concurrence. The rationale of Justice Harlan's approach requires that the Court apply it in all cases, not just in those cases in which a majority favors the result it yields; and for now it does not appear that the Court is prepared to take this course.

AKE *v.* OKLAHOMA

CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF OKLAHOMA

No. 83-5424. Argued November 7, 1984—Decided February 26, 1985

Petitioner, an indigent, was charged with first-degree murder and shooting with intent to kill. At his arraignment in an Oklahoma trial court, his behavior was so bizarre that the trial judge, *sua sponte*, ordered him to be examined by a psychiatrist. Shortly thereafter, the examining psychiatrist found petitioner to be incompetent to stand trial and suggested that he be committed. But six weeks later, after being committed to the state mental hospital, petitioner was found to be competent on the condition that he continue to be sedated within an antipsychotic drug. The State then resumed proceedings, and at a pretrial conference petitioner's attorney informed the court that he would raise an insanity defense, and requested a psychiatric evaluation at state expense to determine petitioner's mental state at the time of the offense, claiming that he was entitled to such an evaluation by the Federal Constitution. On the basis of *United States ex rel. Smith* v. *Baldi*, 344 U. S. 561, the trial court denied petitioner's motion for such an evaluation. At the guilt phase of the ensuing trial, the examining psychiatrists testified that petitioner was dangerous to society, but there was no testimony as to his sanity at the time of the offense. The jury rejected the insanity defense, and petitioner was convicted on all counts. At the sentencing proceeding, the State asked for the death penalty on the murder counts, relying on the examining psychiatrists' testimony to establish the likelihood of petitioner's future dangerous behavior. Petitioner had no expert witness to rebut this testimony or to give evidence in mitigation of his punishment, and he was sentenced to death. The Oklahoma Court of Criminal Appeals affirmed the convictions and sentences. After rejecting, on the merits, petitioner's federal constitutional claim that, as an indigent defendant, he should have been provided the services of a court-appointed pyschiatrist, the court ruled that petitioner had waived such claim by not repeating his request for a psychiatrist in his motion for a new trial.

Held:

1. This Court has jurisdiction to review this case. The Oklahoma Court of Criminal Appeals' holding that the federal constitutional claim to a court-appointed psychiatrist was waived depended on the court's

federal-law ruling and consequently does not present an independent state ground for its decision. Pp. 74–75.

2. When a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue if the defendant cannot otherwise afford one. Pp. 76–85.

(a) In determining whether, and under what conditions, a psychiatrist's participation is important enough to preparation of a defense to require the State to provide an indigent defendant with access to a psychiatrist, there are three relevant factors: (i) the private interest that will be affected by the State's actions; (ii) the State's interest that will be affected if the safeguard is to be provided; and (iii) the probable value of the additional or substitute safeguards that are sought and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided. The private interest in the accuracy of a criminal proceeding is almost uniquely compelling. The State's interest in denying petitioner a psychiatrist's assistance is not substantial in light of the compelling interest of both the State and petitioner in accurate disposition. And without a psychiatrist's assistance to conduct a professional examination on issues relevant to the insanity defense, to help determine whether that defense is viable, to present testimony, and to assist in preparing the cross-examination of the State's psychiatric witnesses, the risk of an inaccurate resolution of sanity issues is extremely high. This is so particularly when the defendant is able to make an *ex parte* threshold showing that his sanity is likely to be a significant factor in his defense. Pp. 78–83.

(b) When the State at a capital sentencing proceeding presents psychiatric evidence of the defendant's future dangerousness, the defendant, without a psychiatrist's assistance, cannot offer an expert's opposing view, and thereby loses a significant opportunity to raise in the jurors' minds questions about the State's proof of an aggravating factor. In such a circumstance, where the consequence of error is so great, the relevance of responsive psychiatric testimony so evident, and the State's burden so slim, due process requires access to a psychiatric examination on relevant issues, to a psychiatrist's testimony, and to assistance in preparation at the sentencing phase. Pp. 83–84.

(c) *United States ex rel. Smith* v. *Baldi*, *supra*, is not authority for absolving the trial court of its obligation to provide petitioner access to a psychiatrist. Pp. 84–85.

3. On the record, petitioner was entitled to access to a psychiatrist's assistance at his trial, it being clear that his mental state at the time of

the offense was a substantial factor in his defense, and that the trial court was on notice of that fact when the request for a court-appointed psychiatrist was made. In addition, petitioner's future dangerousness was a significant factor at the sentencing phase, so as to entitle him to a psychiatrist's assistance on this issue, and the denial of that assistance deprived him of due process. Pp. 86–87.

663 P. 2d 1, reversed and remanded.

MARSHALL, J., delivered the opinion of the Court, in which BRENNAN, WHITE, BLACKMUN, POWELL, STEVENS, and O'CONNOR, JJ., joined. BURGER, C. J., filed an opinion concurring in the judgment, *post*, p. 87. REHNQUIST, J., filed a dissenting opinion, *post*, p. 87.

Arthur B. Spitzer argued the cause for petitioner. With him on the briefs were *Elizabeth Symonds*, *Charles S. Sims*, *Burt Neuborne*, and *William B. Rogers*.

Michael C. Turpen, Attorney General of Oklahoma, argued the cause for respondent. With him on the brief was *David W. Lee*, Assistant Attorney General.*

JUSTICE MARSHALL delivered the opinion of the Court.

The issue in this case is whether the Constitution requires that an indigent defendant have access to the psychiatric examination and assistance necessary to prepare an effective defense based on his mental condition, when his sanity at the time of the offense is seriously in question.

I

Late in 1979, Glen Burton Ake was arrested and charged with murdering a couple and wounding their two children. He was arraigned in the District Court for Canadian County,

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*Briefs of *amici curiae* urging reversal were filed for the New Jersey Department of the Public Advocate by *Joseph H. Rodriguez* and *Michael L. Perlin;* for the American Psychiatric Association by *Joel I. Klein;* and for the American Psychological Association et al. by *Margaret Farrell Ewing*, *Donald N. Bersoff*, and *Bruce J. Ennis*. Briefs of *amici curiae* also supporting petitioner were filed for the Public Defender of Oklahoma et al. by *Robert A. Ravitz*, *Frank McCarthy*, and *Thomas J. Ray, Jr.;* and for the National Legal Aid and Defender Association et al. by *Richard J. Wilson* and *James M. Doyle*.

Okla., in February 1980. His behavior at arraignment, and in other prearraignment incidents at the jail, was so bizarre that the trial judge, *sua sponte*, ordered him to be examined by a psychiatrist "for the purpose of advising with the Court as to his impressions of whether the Defendant may need an extended period of mental observation." App. 2. The examining psychiatrist reported: "At times [Ake] appears to be frankly delusional . . . . He claims to be the 'sword of vengeance' of the Lord and that he will sit at the left hand of God in heaven." *Id.*, at 8. He diagnosed Ake as a probable paranoid schizophrenic and recommended a prolonged psychiatric evaluation to determine whether Ake was competent to stand trial.

In March, Ake was committed to a state hospital to be examined with respect to his "present sanity," *i. e.*, his competency to stand trial. On April 10, less than six months after the incidents for which Ake was indicted, the chief forensic psychiatrist at the state hospital informed the court that Ake was not competent to stand trial. The court then held a competency hearing, at which a psychiatrist testified:

> "[Ake] is a psychotic . . . his psychiatric diagnosis was that of paranoid schizophrenia—chronic, with exacerbation, that is with current upset, and that in addition . . . he is dangerous. . . . [B]ecause of the severity of his mental illness and because of the intensities of his rage, his poor control, his delusions, he requires a maximum security facility within—I believe—the State Psychiatric Hospital system." *Id.*, at 11–12.

The court found Ake to be a "mentally ill person in need of care and treatment" and incompetent to stand trial, and ordered him committed to the state mental hospital.

Six weeks later, the chief forensic psychiatrist informed the court that Ake had become competent to stand trial. At the time, Ake was receiving 200 milligrams of Thorazine, an antipsychotic drug, three times daily, and the psychiatrist indicated that, if Ake continued to receive that dosage, his condition would remain stable. The State then resumed proceedings against Ake.

At a pretrial conference in June, Ake's attorney informed the court that his client would raise an insanity defense. To enable him to prepare and present such a defense adequately, the attorney stated, a psychiatrist would have to examine Ake with respect to his mental condition at the time of the offense. During Ake's 3-month stay at the state hospital, no inquiry had been made into his sanity at the time of the offense, and, as an indigent, Ake could not afford to pay for a psychiatrist. Counsel asked the court either to arrange to have a psychiatrist perform the examination, or to provide funds to allow the defense to arrange one. The trial judge rejected counsel's argument that the Federal Constitution requires that an indigent defendant receive the assistance of a psychiatrist when that assistance is necessary to the defense, and he denied the motion for a psychiatric evaluation at state expense on the basis of this Court's decision in *United States ex rel. Smith* v. *Baldi*, 344 U. S. 561 (1953).

Ake was tried for two counts of murder in the first degree, a crime punishable by death in Oklahoma, and for two counts of shooting with intent to kill. At the guilt phase of trial, his sole defense was insanity. Although defense counsel called to the stand and questioned each of the psychiatrists who had examined Ake at the state hospital, none testified about his mental state at the time of the offense because none had examined him on that point. The prosecution, in turn, asked each of these psychiatrists whether he had performed or seen the results of any examination diagnosing Ake's mental state at the time of the offense, and each doctor replied that he had not. *As a result, there was no expert testimony for either side on Ake's sanity at the time of the offense.* The jurors were then instructed that Ake could be found not guilty by reason of insanity if he did not have the ability to distinguish right from wrong at the time of the alleged offense. They were further told that Ake was to be presumed sane at the time of the crime unless *he* presented evidence sufficient to raise a reasonable doubt about his sanity at that time. If he raised such a doubt in their minds, the jurors were informed, the burden of proof shifted to the State to prove sanity beyond a reasonable doubt.[1] The jury rejected Ake's insanity defense and returned a verdict of guilty on all counts.

At the sentencing proceeding, the State asked for the death penalty. No new evidence was presented. The prosecutor relied significantly on the testimony of the state psychiatrists who had examined Ake, and who had testified at the guilt phase that Ake was dangerous to society, to establish the likelihood of his future dangerous behavior. Ake had no expert witness to rebut this testimony or to introduce on his behalf evidence in mitigation of his punishment. The jury sentenced Ake to death on each of the two murder counts, and to 500 years' imprisonment on each of the two counts of shooting with intent to kill.

On appeal to the Oklahoma Court of Criminal Appeals, Ake argued that, as an indigent defendant, he should have been provided the services of a court-appointed psychiatrist. The court rejected this argument, observing: "We have held numerous times that, the unique nature of capital cases notwithstanding, the State does not have the responsibility of providing such services to indigents charged with capital crimes." 663 P. 2d 1, 6 (1983). Finding no error in Ake's other claims,[2] the court affirmed the convictions and sentences. We granted certiorari. 465 U. S. 1099 (1984).

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[1] Oklahoma Stat., Tit. 21, § 152 (1981), provides that "[a]ll persons are capable of committing crimes, except those belonging to the following classes . . . (4) Lunatics, insane persons and all persons of unsound mind, including persons temporarily or partially deprived of reason, upon proof that at the time of committing the act charged against them they were incapable of knowing its wrongfulness." The Oklahoma Court of Criminal Appeals has held that there is an initial presumption of sanity in every case, "which remains until the defendant raises, by sufficient evidence, a reasonable doubt as to his sanity at the time of the crime. If the issue is so raised, the burden of proving the defendant's sanity beyond a reasonable doubt falls upon the State." 663 P. 2d 1, 10 (1983) (case below); see also *Rogers* v. *State*, 634 P. 2d 743 (Okla. Crim. App. 1981).

We hold that when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue if the defendant cannot otherwise afford one. Accordingly, we reverse.

II

Initially, we must address our jurisdiction to review this case. After ruling on the merits of Ake's claim, the Oklahoma court observed that in his motion for a new trial Ake had not repeated his request for a psychiatrist and that the claim was thereby waived. 663 P. 2d, at 6. The court cited *Hawkins* v. *State*, 569 P. 2d 490 (Okla. Crim. App. 1977), for this proposition. The State argued in its brief to this Court that the court's holding on this issue therefore rested on an adequate and independent state ground and ought not be reviewed. Despite the court's state-law ruling, we conclude that the state court's judgment does not rest on an independent state ground and that our jurisdiction is therefore properly exercised.

The Oklahoma waiver rule does not apply to fundamental trial error. See *Hawkins* v. *State*, *supra*, at 493; *Gaddis*

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[2] The Oklahoma Court of Criminal Appeals also dismissed Ake's claim that the Thorazine he was given during trial rendered him unable to understand the proceedings against him or to assist counsel with his defense. The court acknowledged that Ake "stared vacantly ahead throughout the trial" but rejected Ake's challenge in reliance on a state psychiatrist's word that Ake was competent to stand trial while under the influence of the drug. 663 P. 2d, at 7–8, and n. 5. Ake petitioned for a writ of certiorari on this issue as well. In light of our disposition of the other issues presented, we need not address this claim.

v. *State*, 447 P. 2d 42, 45–46 (Okla. Crim. App. 1968). Under Oklahoma law, and as the State conceded at oral argument, federal constitutional errors are "fundamental." Tr. of Oral Arg. 51–52; see *Buchanan* v. *State*, 523 P. 2d 1134, 1137 (Okla. Crim. App. 1974) (violation of constitutional right constitutes fundamental error); see also *Williams* v. *State*, 658 P. 2d 499 (Okla. Crim. App. 1983). Thus, the State has made application of the procedural bar depend on an antecedent ruling on federal law, that is, on the determination of whether federal constitutional error has been committed. Before applying the waiver doctrine to a constitutional question, the state court must rule, either explicitly or implicitly, on the merits of the constitutional question.

As we have indicated in the past, when resolution of the state procedural law question depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law, and our jurisdiction is not precluded. See *Herb* v. *Pitcairn*, 324 U. S. 117, 126 (1945) ("We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of Federal laws, our review could amount to nothing more than an advisory opinion"); *Enterprise Irrigation District* v. *Farmers Mutual Canal Co.*, 243 U. S. 157, 164 (1917) ("But where the non-Federal ground is so interwoven with the other as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, our jurisdiction is plain"). In such a case, the federal-law holding is integral to the state court's disposition of the matter, and our ruling on the issue is in no respect advisory. In this case, the additional holding of the state court—that the constitutional challenge presented here was waived—depends on the court's federal-law ruling and consequently does not present an independent state ground for the decision rendered. We therefore turn to a consideration of the merits of Ake's claim.

III

This Court has long recognized that when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense. This elementary principle, grounded in significant part on the Fourteenth Amendment's due process guarantee of fundamental fairness, derives from the belief that justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake. In recognition of this right, this Court held almost 30 years ago that once a State offers to criminal defendants the opportunity to appeal their cases, it must provide a trial transcript to an indigent defendant if the transcript is necessary to a decision on the merits of the appeal. *Griffin* v. *Illinois*, 351 U. S. 12 (1956). Since then, this Court has held that an indigent defendant may not be required to pay a fee before filing a notice of appeal of his conviction, *Burns* v. *Ohio*, 360 U. S. 252 (1959), that an indigent defendant is entitled to the assistance of counsel at trial, *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), and on his first direct appeal as of right, *Douglas* v. *California*, 372 U. S. 353 (1963), and that such assistance must be effective. See *Evitts* v. *Lucey*, 469 U. S. 387 (1985); *Strickland* v. *Washington*, 466 U. S. 668 (1984); *McMann* v. *Richardson*, 397 U. S. 759, 771, n. 14 (1970).[3] Indeed, in *Little* v. *Streater*, 452 U. S. 1 (1981), we extended this principle of meaningful participation to a "quasi-criminal" proceeding and held that, in a paternity action, the State cannot deny the putative father blood grouping tests, if he cannot otherwise afford them.

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[3] This Court has recently discussed the role that due process has played in such cases, and the separate but related inquiries that due process and equal protection must trigger. See *Evitts* v. *Lucey; Bearden* v. *Georgia*, 461 U. S. 660 (1983).

Meaningful access to justice has been the consistent theme of these cases. We recognized long ago that mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and that a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense. Thus, while the Court has not held that a State must purchase for the indigent defendant all the assistance that his wealthier counterpart might buy, see *Ross* v. *Moffitt*, 417 U. S. 600 (1974), it has often reaffirmed that fundamental fairness entitles indigent defendants to "an adequate opportunity to present their claims fairly within the adversary system," *id.*, at 612. To implement this principle, we have focused on identifying the "basic tools of an adequate defense or appeal," *Britt* v. *North Carolina*, 404 U. S. 226, 227 (1971), and we have required that such tools be provided to those defendants who cannot afford to pay for them.

To say that these basic tools must be provided is, of course, merely to begin our inquiry. In this case we must decide whether, and under what conditions, the participation of a psychiatrist is important enough to preparation of a defense to require the State to provide an indigent defendant with access to competent psychiatric assistance in preparing the defense. Three factors are relevant to this determination. The first is the private interest that will be affected by the action of the State. The second is the governmental interest that will be affected if the safeguard is to be provided. The third is the probable value of the additional or substitute procedural safeguards that are sought, and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided. See *Little* v. *Streater*, *supra*, at 6; *Mathews* v. *Eldridge*, 424 U. S. 319, 335 (1976). We turn, then, to apply this standard to the issue before us.

A

The private interest in the accuracy of a criminal proceeding that places an individual's life or liberty at risk is almost uniquely compelling. Indeed, the host of safeguards fashioned by this Court over the years to diminish the risk of erroneous conviction stands as a testament to that concern. The interest of the individual in the outcome of the State's effort to overcome the presumption of innocence is obvious and weighs heavily in our analysis.

We consider, next, the interest of the State. Oklahoma asserts that to provide Ake with psychiatric assistance on the record before us would result in a staggering burden to the State. Brief for Respondent 46–47. We are unpersuaded by this assertion. Many States, as well as the Federal Government, currently make psychiatric assistance available to indigent defendants, and they have not found the financial burden so great as to preclude this assistance.[4] This is especially so when the obligation of the State is limited to provision of one competent psychiatrist, as it is in many States, and as we limit the right we recognize today. At the same time, it is difficult to identify any interest of the State, other than that in its economy, that weighs against recognition of this right. The State's interest in prevailing at trial—unlike that of a private litigant—is necessarily tempered by its interest in the fair and accurate adjudication of criminal cases. Thus, also unlike a private litigant, a State may not legitimately assert an interest in maintenance of a strategic advantage over the defense, if the result of that advantage is to cast a pall on the accuracy of the verdict obtained. We therefore conclude that the governmental interest in denying Ake the assistance of a psychiatrist is not substantial, in light of the compelling interest of both the State and the individual in accurate dispositions.

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[4] See Ala. Code § 15–12–21 (Supp. 1984); Alaska Stat. Ann. § 18.85.100 (1981); Ariz. Rev. Stat. Ann. § 13–4013 (1978) (capital cases; extended to noncapital cases in *State* v. *Peeler*, 126 Ariz. 254, 614 P. 2d 335 (App. 1980)); Ark. Stat. Ann. § 17–456 (Supp. 1983); Cal. Penal Code Ann. § 987.9 (West Supp. 1984) (capital cases; right recognized in all cases in *People* v. *Worthy*, 109 Cal. App. 3d 514, 167 Cal. Rptr. 402 (1980)); Colo. Rev. Stat. § 18–1–403 (Supp. 1984); *State* v. *Clemons*, 168 Conn. 395, 363 A. 2d 33 (1975); Del. Code Ann., Tit. 29, § 4603 (1983); Fla. Rule Crim. Proc. 3.216; Haw. Rev. Stat. § 802–7 (Supp. 1983); *State* v. *Olin*, 103 Idaho 391, 648 P. 2d 203 (1982); *People* v. *Watson*, 36 Ill. 2d 228, 221 N. E. 2d 645 (1966); *Owen* v. *State*, 272 Ind. 122, 396 N. E. 2d 376 (1979) (trial judge may authorize or appoint experts where necessary); Iowa Rule Crim. Proc. 19; Kan. Stat. Ann. § 22–4508 (Supp. 1983); Ky. Rev. Stat. §§ 31.070, 31.110, 31.185 (1980); *State* v. *Madison*, 345 So. 2d 485 (La. 1977); *State* v. *Anaya*, 456 A. 2d 1255 (Me. 1983); Mass. Gen. Laws Ann., ch. 261, § 27C(4) (West Supp. 1984–1985); Mich. Comp. Laws Ann. § 768.20a(3) (Supp. 1983); Minn. Stat. § 611.21 (1982); Miss. Code Ann. § 99–15–17 (Supp. 1983); Mo. Rev. Stat. § 552.030.4 (Supp. 1984); Mont. Code Ann. § 46–8–201 (1983); *State* v. *Suggett*, 200 Neb. 693, 264 N. W. 2d 876 (1978) (discretion to appoint psychiatrist rests with trial court); Nev. Rev. Stat. § 7.135 (1983); N. H. Rev. Stat. Ann. § 604–A:6 (Supp. 1983); N. M. Stat. Ann. §§ 31–16–2, 31–16–8 (1984); N. Y. County Law § 722–c (McKinney Supp.

Last, we inquire into the probable value of the psychiatric assistance sought, and the risk of error in the proceeding if such assistance is not offered. We begin by considering the pivotal role that psychiatry has come to play in criminal proceedings. More than 40 States, as well as the Federal Government, have decided either through legislation or judicial decision that indigent defendants are entitled, under certain circumstances, to the assistance of a psychiatrist's expertise.[5] For example, in subsection (e) of the Criminal Justice Act, 18 U. S. C. § 3006A, Congress has provided that indi-

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1984–1985); N. C. Gen. Stat. § 7A–454 (1981); Ohio Rev. Code Ann. § 2941.51 (Supp. 1983); Ore. Rev. Stat. § 135.055(4) (1983); *Commonwealth* v. *Gelormo*, 327 Pa. Super. 219, 227, and n. 5, 475 A. 2d 765, 769, and n. 5 (1984); R. I. Gen. Laws § 9–17–19 (Supp. 1984); S. C. Code § 17–3–80 (Supp. 1983); S. D. Codified Laws § 23A–40–8 (Supp. 1984); Tenn. Code Ann. § 40–14–207 (Supp. 1984); Tex. Code Crim. Proc. Ann., Art. § 26.05 (Vernon Supp. 1984); Utah Code Ann. § 77–32–1 (1982); Wash. Rev. Code §§ 10.77.020, 10.77.060 (1983) (see also *State* v. *Cunningham*, 18 Wash. App. 517, 569 P. 2d 1211 (1977)); W. Va. Code § 29–21–14(e)(3) (Supp. 1984); Wyo. Stat. §§ 7–1–108; 7–1–110; 7–1–116 (1977).

[5] See n. 4, *supra*.

gent defendants shall receive the assistance of all experts "necessary for an adequate defense." Numerous state statutes guarantee reimbursement for expert services under a like standard. And in many States that have not assured access to psychiatrists through the legislative process, state courts have interpreted the State or Federal Constitution to require that psychiatric assistance be provided to indigent defendants when necessary for an adequate defense, or when insanity is at issue.[6]

These statutes and court decisions reflect a reality that we recognize today, namely, that when the State has made the defendant's mental condition relevant to his criminal culpability and to the punishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense. In this role, psychiatrists gather facts, through professional examination, interviews, and elsewhere, that they will share with the judge or jury; they analyze the information gathered and from it draw plausible conclusions about the defendant's mental condition, and about the effects of any disorder on behavior; and they offer opinions about how the defendant's mental condition might have affected his behavior at the time in question. They know the probative questions to ask of the opposing party's psychiatrists and how to interpret their answers. Unlike lay witnesses, who can merely describe symptoms they believe might be relevant to the defendant's mental state, psychiatrists can identify the "elusive and often deceptive" symptoms of insanity, *Solesbee* v. *Balkcom*, 339 U. S. 9, 12 (1950), and tell the jury why their observations are relevant. Further, where permitted by evidentiary rules, psychiatrists can translate a medical diagnosis into language that will assist the trier of fact, and therefore offer evidence in a form that has meaning for the task at hand. Through this process of investigation, interpretation, and testimony, psychiatrists ideally assist lay jurors, who generally have no training in psychiatric matters, to make a sensible and educated determination about the mental condition of the defendant at the time of the offense.

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[6] *Ibid.*

Psychiatry is not, however, an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness, on the appropriate diagnosis to be attached to given behavior and symptoms, on cure and treatment, and on likelihood of future dangerousness. Perhaps because there often is no single, accurate psychiatric conclusion on legal insanity in a given case, juries remain the primary factfinders on this issue, and they must resolve differences in opinion within the psychiatric profession on the basis of the evidence offered by each party. When jurors make this determination about issues that inevitably are complex and foreign, the testimony of psychiatrists can be crucial and "a virtual necessity if an insanity plea is to have any chance of success."[7] By organizing a defendant's mental history, examination results and behavior, and other information, interpreting it in light of their expertise, and then laying out their investigative and analytic process to the jury, the psychiatrists for each party enable the jury to make its most accurate determination of the truth on the issue before them. It is for this reason that States rely on psychiatrists as examiners, consultants, and witnesses, and that private individuals do as well, when they can afford to do so.[8] In so saying, we neither approve nor disapprove the widespread reliance on psychiatrists but instead recognize the unfairness of a contrary holding in light of the evolving practice.

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[7] Gardner, The Myth of the Impartial Psychiatric Expert—Some Comments Concerning Criminal Responsibility and the Decline of the Age of Therapy, 2 Law & Psychology Rev. 99, 113–114 (1976). In addition, "[t]estimony emanating from the depth and scope of specialized knowledge is very impressive to a jury. The same testimony from another source can have less effect." F. Bailey & H. Rothblatt, Investigation and Preparation of Criminal Cases § 175 (1970); see also ABA Standards for Criminal Justice 5–1.4, Commentary, p. 5·20 (2d ed. 1980) ("The quality of representation at trial . . . may be excellent and yet valueless to the defendant if the defense requires the assistance of a psychiatrist . . . and no such services are available").

The foregoing leads inexorably to the conclusion that, without the assistance of a psychiatrist to conduct a professional examination on issues relevant to the defense, to help determine whether the insanity defense is viable, to present testimony, and to assist in preparing the cross-examination of a State's psychiatric witnesses, the risk of an inaccurate resolution of sanity issues is extremely high. With such assistance, the defendant is fairly able to present at least enough information to the jury, in a meaningful manner, as to permit it to make a sensible determination.

A defendant's mental condition is not necessarily at issue in every criminal proceeding, however, and it is unlikely that psychiatric assistance of the kind we have described would be of probable value in cases where it is not. The risk of error from denial of such assistance, as well as its probable value, is most predictably at its height when the defendant's mental condition is seriously in question. When the defendant is able to make an *ex parte* threshold showing to the trial court that his sanity is likely to be a significant factor in his defense, the need for the assistance of a psychiatrist is readily apparent. It is in such cases that a defense may be devastated by the absence of a psychiatric examination and testimony; with such assistance, the defendant might have a reasonable chance of success. In such a circumstance, where the potential accuracy of the jury's determination is so dramatically enhanced, and where the interests of the individual and the State in an accurate proceeding are substantial, the State's interest in its fisc must yield.[9]

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[8] See also *Reilly* v. *Barry*, 250 N. Y. 456, 461, 166 N. E. 165, 167 (1929) (Cardozo, C. J.) ("[U]pon the trial of certain issues, such as insanity or forgery, experts are often necessary both for prosecution and for defense. . . . [A] defendant may be at an unfair disadvantage, if he is unable because of poverty to parry by his own witnesses the thrusts of those against him"); 2 I. Goldstein & F. Lane, Goldstein Trial Techniques § 14.01 (2d ed. 1969) ("Modern civilization, with its complexities of business, science, and the professions, has made expert and opinion evidence a necessity. This is true where the subject matters involved are beyond the general knowledge of the average juror"); Henning, The Psychiatrist in the Legal Process, in By Reason of Insanity: Essays on Psychiatry and the Law 217, 219–220 (L. Freedman ed., 1983) (discussing the growing role of psychiatric witnesses as a result of changing definitions of legal insanity and increased judicial and legislative acceptance of the practice).

We therefore hold that when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense. This is not to say, of course, that the indigent defendant has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own. Our concern is that the indigent defendant have access to a competent psychiatrist for the purpose we have discussed, and as in the case of the provision of counsel we leave to the States the decision on how to implement this right.

B

Ake also was denied the means of presenting evidence to rebut the State's evidence of his future dangerousness. The foregoing discussion compels a similar conclusion in the context of a capital sentencing proceeding, when the State presents psychiatric evidence of the defendant's future dangerousness. We have repeatedly recognized the defendant's compelling interest in fair adjudication at the sentencing phase of a capital case. The State, too, has a profound interest in assuring that its ultimate sanction is not erroneously imposed, and we do not see why monetary considerations should be more persuasive in this context than at trial. The variable on which we must focus is, therefore, the probable value that the assistance of a psychiatrist will have in this area, and the risk attendant on its absence.

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[9] In any event, before this Court the State concedes that such a right exists but argues only that it is not implicated here. Brief for Respondent 45; Tr. of Oral Arg. 52. It therefore recognizes that the financial burden is not always so great as to outweigh the individual interest.

This Court has upheld the practice in many States of placing before the jury psychiatric testimony on the question of future dangerousness, see *Barefoot* v. *Estelle*, 463 U. S. 880, 896–905 (1983), at least where the defendant has had access to an expert of his own, *id.*, at 899, n. 5. In so holding, the Court relied, in part, on the assumption that the factfinder would have before it both the views of the prosecutor's psychiatrists and the "opposing views of the defendant's doctors" and would therefore be competent to "uncover, recognize, and take due account of . . . shortcomings" in predictions on this point. *Id.*, at 899. Without a psychiatrist's assistance, the defendant cannot offer a well-informed expert's opposing view, and thereby loses a significant opportunity to raise in the jurors' minds questions about the State's proof of an aggravating factor. In such a circumstance, where the consequence of error is so great, the relevance of responsive psychiatric testimony so evident, and the burden on the State so slim, due process requires access to a psychiatric examination on relevant issues, to the testimony of the psychiatrist, and to assistance in preparation at the sentencing phase.

C

The trial court in this case believed that our decision in *United States ex rel. Smith* v. *Baldi*, 344 U. S. 561 (1953), absolved it completely of the obligation to provide access to a psychiatrist. For two reasons, we disagree. First, neither *Smith*, nor *McGarty* v. *O'Brien*, 188 F. 2d 151, 155 (CA1 1951), to which the majority cited in *Smith*, even suggested that the Constitution does not require any psychiatric examination or assistance whatsoever. Quite to the contrary, the record in *Smith* demonstrated that neutral psychiatrists in fact had examined the defendant as to his sanity and had testified on that subject at trial, and it was on that basis that the Court found no additional assistance was necessary. *Smith, supra*, at 568; see also *United States ex rel. Smith* v. *Baldi*, 192 F. 2d 540, 547 (CA3 1951). Similarly, in *McGarty*, the defendant had been examined by two psychiatrists who were not beholden to the prosecution. We therefore reject the State's contention that *Smith* supports the broad proposition that "[t]here is presently no constitutional right to have a psychiatric examination of a defendant's sanity at the time of the offense." Brief in Opposition 8. At most it supports the proposition that there is no constitutional right to more psychiatric assistance than the defendant in *Smith* had received.

In any event, our disagreement with the State's reliance on *Smith* is more fundamental. That case was decided at a time when indigent defendants in state courts had no constitutional right to even the presence of counsel. Our recognition since then of elemental constitutional rights, each of which has enhanced the ability of an indigent defendant to attain a fair hearing, has signaled our increased commitment to assuring meaningful access to the judicial process. Also, neither trial practice nor legislative treatment of the role of insanity in the criminal process sits paralyzed simply because this Court has once addressed them, and we would surely be remiss to ignore the extraordinarily enhanced role of psychiatry in criminal law today.[10] Shifts in all these areas since the time of *Smith* convince us that the opinion in that case was addressed to altogether different variables, and that we are not limited by it in considering whether fundamental fairness today requires a different result.

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[10] See Henning, *supra* n. 8; Gardner, *supra* n. 7, at 99; H. Huckabee, Lawyers, Psychiatrists and Criminal Law: Cooperation or Chaos? 179–181 (1980) (discussing reasons for the shift toward reliance on psychiatrists); Huckabee, Resolving the Problem of Dominance of Psychiatrists in Criminal Responsibility Decisions: A Proposal, 27 Sw. L. J. 790 (1973).

IV

We turn now to apply these standards to the facts of this case. On the record before us, it is clear that Ake's mental state at the time of the offense was a substantial factor in his defense, and that the trial court was on notice of that fact when the request for a court-appointed psychiatrist was made. For one, Ake's sole defense was that of insanity. Second, Ake's behavior at arraignment, just four months after the offense, was so bizarre as to prompt the trial judge, *sua sponte*, to have him examined for competency. Third, a state psychiatrist shortly thereafter found Ake to be incompetent to stand trial, and suggested that he be committed. Fourth, when he was found to be competent six weeks later, it was only on the condition that he be sedated with large doses of Thorazine three times a day, during trial. Fifth, the psychiatrists who examined Ake for competency described to the trial court the severity of Ake's mental illness less than six months after the offense in question, and suggested that this mental illness might have begun many years earlier. App. 35. Finally, Oklahoma recognizes a defense of insanity, under which the initial burden of producing evidence falls on the defendant.[11] Taken together, these factors make clear that the question of Ake's sanity was likely to be a significant factor in his defense.[12]

In addition, Ake's future dangerousness was a significant factor at the sentencing phase. The state psychiatrist who treated Ake at the state mental hospital testified at the guilt phase that, because of his mental illness, Ake posed a threat of continuing criminal violence. This testimony raised the issue of Ake's future dangerousness, which is an aggravating factor under Oklahoma's capital sentencing scheme, Okla. Stat., Tit. 21, § 701.12(7) (1981), and on which the prosecutor relied at sentencing. We therefore conclude that Ake also was entitled to the assistance of a psychiatrist on this issue and that the denial of that assistance deprived him of due process.[13]

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[11] See n. 1, *supra*.

[12] We express no opinion as to whether any of these factors, alone or in combination, is necessary to make this finding.

Accordingly, we reverse and remand for a new trial.

It is so ordered.

CHIEF JUSTICE BURGER, concurring in the judgment.

This is a capital case in which the Court is asked to decide whether a State may refuse an indigent defendant "any opportunity whatsoever" to obtain psychiatric evidence for the preparation and presentation of a claim of insanity by way of defense when the defendant's legal sanity at the time of the offense was "seriously in issue."

The facts of the case and the question presented confine the actual holding of the Court. In capital cases the finality of the sentence imposed warrants protections that may or may not be required in other cases. Nothing in the Court's opinion reaches noncapital cases.

JUSTICE REHNQUIST, dissenting.

The Court holds that "when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue if the defendant cannot otherwise afford one." *Ante*, at 74. I do not think that the facts of this case warrant the establishment of such a principle; and I think that even if the factual predicate of the Court's statement were established, the constitutional rule announced by the Court is far too broad. I would limit the rule to capital cases, and make clear that the entitlement is to an independent psychiatric evaluation, not to a defense consultant.

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[13] Because we conclude that the Due Process Clause guaranteed to Ake the assistance he requested and was denied, we have no occasion to consider the applicability of the Equal Protection Clause, or the Sixth Amendment, in this context.

Petitioner Ake and his codefendant Hatch quit their jobs on an oil field rig in October 1979, borrowed a car, and went looking for a location to burglarize. They drove to the rural home of Reverend and Mrs. Richard Douglass, and gained entrance to the home by a ruse. Holding Reverend and Mrs. Douglass and their children, Brooks and Leslie, at gunpoint, they ransacked the home; they then bound and gagged the mother, father, and son, and forced them to lie on the living room floor. Ake and Hatch then took turns attempting to rape 12-year-old Leslie Douglass in a nearby bedroom. Having failed in these efforts, they forced her to lie on the living room floor with the other members of her family.

Ake then shot Reverend Douglass and Leslie each twice, and Mrs. Douglass and Brooks once, with a .357 magnum pistol, and fled. Mrs. Douglass died almost immediately as a result of the gunshot wound; Reverend Douglass' death was caused by a combination of the gunshots he received, and strangulation from the manner in which he was bound. Leslie and Brooks managed to untie themselves and to drive to the home of a nearby doctor. Ake and his accomplice were apprehended in Colorado following a month-long crime spree that took them through Arkansas, Louisiana, Texas, and other States in the western half of the United States.

Ake was extradited from Colorado to Oklahoma on November 20, 1979, and placed in the city jail in El Reno, Oklahoma. Three days after his arrest, he asked to speak to the Sheriff. Ake gave the Sheriff a detailed statement concerning the above crimes, which was first taped, then reduced to 44 written pages, corrected, and signed by Ake.

Ake was arraigned on November 23, 1979, and again appeared in court with his codefendant Hatch on December 11th. Hatch's attorney requested and obtained an order transferring Hatch to the state mental hospital for a 60-day observation period to determine his competency to stand trial; although Ake was present in court with his attorney during this proceeding, no such request was made on behalf of Ake.

On January 21, 1980, both Ake and Hatch were bound over for trial at the conclusion of a preliminary hearing. No suggestion of insanity at the time of the commission of the offense was made at this time. On February 14, 1980, Ake appeared for formal arraignment, and at this time became disruptive. The court ordered that Ake be examined by Dr. William Allen, a psychiatrist in private practice, in order to determine his competency to stand trial. On April 10, 1980, a competency hearing was held at the conclusion of which the trial court found that Ake was a mentally ill person in need of care and treatment, and he was transferred to a state institution. Six weeks later, the chief psychiatrist for the institution advised the court that Ake was now competent to stand trial, and the murder trial began on June 23, 1980. At this time Ake's attorney withdrew a pending motion for jury trial on present sanity. Outside the presence of the jury the State produced testimony of a cellmate of Ake, who testified that Ake had told him that he was going to try to "play crazy."

The State at trial produced evidence as to guilt, and the only evidence offered by Ake was the testimony of the doctors who had observed and treated him during his confinement pursuant to the previous order of the court. Each of these doctors testified as to Ake's mental condition at the time of his confinement in the institution, but none could express a view as to his mental condition at the time of the offense. Significantly, although all three testified that Ake suffered from some form of mental illness six months after he committed the murders, on cross-examination two of the psychiatrists specifically stated that they had "no opinion" concerning Ake's capacity to tell right from wrong at the time of the offense, and the third would only speculate that a psychosis might have been "apparent" at that time. The Court makes a point of the fact that "there was no expert testimony for either side on Ake's sanity at the time of the offense." *Ante*, at 72 (emphasis deleted). In addition, Ake called no lay witnesses, although some apparently existed who could have testified concerning Ake's actions that might have had a bearing on his sanity at the time of the offense; and although two "friends" of Ake's who had been with him at times proximate to the murders testified at trial at the behest of the prosecution, defense counsel did not question them concerning any of Ake's actions that might have a bearing on his sanity.

The Court's opinion states that before an indigent defendant is entitled to a state-appointed psychiatrist the defendant must make "a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial." *Ante*, at 74. But nowhere in the opinion does the Court elucidate how that requirement is satisfied in this particular case. Under Oklahoma law, the burden is initially on the defendant to raise a reasonable doubt as to his sanity at the time of the offense. Once that burden is satisfied, the burden shifts to the State to prove sanity beyond a reasonable doubt. *Ake* v. *State*, 663 P. 2d 1, 10 (1983). Since the State introduced *no* evidence concerning Ake's sanity at the time of the offense, it seems clear that as a matter of state law Ake failed to carry the initial burden. Indeed, that was the holding of the Oklahoma Court of Criminal Appeals. *Ibid.*

Nor is this a surprising conclusion on the facts here. The evidence of the brutal murders perpetrated on the victims, and of the month-long crime spree following the murders, would not seem to raise any question of sanity unless one were to adopt the dubious doctrine that no one in his right mind would commit a murder. The defendant's 44-page confession, given more than a month after the crimes, does not suggest insanity; nor does the failure of Ake's attorney to move for a competency hearing at the time the codefendant moved for one. The first instance in this record is the disruptive behavior at the time of formal arraignment, to which the trial judge alertly and immediately responded by committing Ake for examination. The trial commenced some two months later, at which time Ake's attorney withdrew a pending motion for jury trial on present sanity, and the State offered the testimony of a cellmate of Ake who said that the latter had told him that he was going to try to "play crazy." The Court apparently would infer from the fact that Ake was diagnosed as mentally ill some six months after the offense that there was a reasonable doubt as to his ability to know right from wrong when he committed it. But even the experts were unwilling to draw this inference.

Before holding that the State is obligated to furnish the services of a psychiatric witness to an indigent defendant who reasonably contests his sanity at the time of the offense, I would require a considerably greater showing than this. And even then I do not think due process is violated merely because an indigent lacks sufficient funds to pursue a state-law defense as thoroughly as he would like. There may well be capital trials in which the State assumes the burden of proving sanity at the guilt phase, or "future dangerousness" at the sentencing phase, and makes significant use of psychiatric testimony in carrying its burden, where "fundamental fairness" would require that an indigent defendant have access to a court-appointed psychiatrist to evaluate him independently and—if the evaluation so warrants—contradict such testimony. But this is not such a case. It is highly doubtful that due process requires a State to make available an insanity defense to a criminal defendant, but in any event if such a defense is afforded the burden of proving insanity can be placed on the defendant. See *Patterson* v. *New York*, 432 U. S. 197 (1977). That is essentially what happened here, and Ake failed to carry his burden under state law. I do not believe the Due Process Clause superimposes a federal standard for determining how and when sanity can legitimately be placed in issue, and I would find no violation of due process under the circumstances.

With respect to the necessity of expert psychiatric testimony on the issue of "future dangerousness," as opposed to sanity at the time of the offense, there is even less support for the Court's holding. Initially I would note that, given the Court's holding that Ake is entitled to a new trial with respect to guilt, there was no need to reach issues raised by the sentencing proceedings, so the discussion of this issue may be treated as dicta. But in any event, the psychiatric testimony concerning future dangerousness was obtained from the psychiatrists when they were called as *defense* witnesses, not prosecution witnesses. Since the State did not initiate this line of testimony, I see no reason why it should be required to produce still more psychiatric witnesses for the benefit of the defendant.

Finally, even if I were to agree with the Court that some right to a state-appointed psychiatrist should be recognized here, I would not grant the broad right to "access to a competent psychiatrist who will conduct an appropriate examination *and assist in evaluation, preparation, and presentation of the defense.*" *Ante*, at 83 (emphasis added). A psychiatrist is not an attorney, whose job it is to advocate. His opinion is sought on a question that the State of Oklahoma treats as a question of *fact*. Since any "unfairness" in these cases would arise from the fact that the only competent witnesses on the question are being hired by the State, all the defendant should be entitled to is one competent opinion—whatever the witness' conclusion—from a psychiatrist who acts independently of the prosecutor's office. Although the independent psychiatrist should be available to answer defense counsel's questions prior to trial, and to testify if called, I see no reason why the defendant should be entitled to an opposing view, or to a "defense" advocate.

For the foregoing reasons, I would affirm the judgment of the Court of Criminal Appeals of Oklahoma.

UNITED STATES *v.* LOUISIANA ET AL. (ALABAMA AND MISSISSIPPI BOUNDARY CASE)

ON EXCEPTIONS TO REPORT OF SPECIAL MASTER

No. 9, Orig. Argued November 26, 1984—Decided February 26, 1985

This case involves the issue whether Mississippi Sound, a body of water immediately south of the mainland of Alabama and Mississippi, consists of inland waters, so as to establish in those States, rather than in the United States, ownership of the lands submerged under the Sound. Following extended proceedings, the Special Master filed a Report in which he concluded, *inter alia,* that the whole of Mississippi Sound qualifies as a historic bay under the Convention on the Territorial Sea and the Contiguous Zone (Convention) and thus constitutes inland waters. Accordingly, he recommended that a decree be entered in favor of Alabama and Mississippi. The United States filed exceptions.

Held: On the record, the Special Master correctly determined that the whole of Mississippi Sound is a historic bay and that its waters therefore are inland waters. Pp. 101–115.

(a) While the term "historic bay" is not defined in the Convention, this Court has stated that a historic bay is a bay "over which a coastal nation has traditionally asserted and maintained dominion with the acquiescence of foreign nations." *United States* v. *California,* 381 U. S. 139, 172. The facts in this case establish that the United States effectively has exercised sovereignty over Mississippi Sound as inland waters from the time of the Louisiana Purchase in 1803 until 1971, and has done so without protest by foreign nations. Pp. 101–111.

(b) Since historic title to Mississippi Sound as inland waters had ripened prior to the United States' disclaimer of the inland-waters status of the Sound in 1971, that disclaimer was insufficient to divest the States of their entitlement to the submerged lands under the Sound. And although the record does not contain evidence of acts of exclusion from the Sound of foreign navigation in innocent passage, such evidence is not invariably essential to a valid claim of historic inland-water status. Pp. 111–115.

Exception of United States to Special Master's recommended ruling that the whole of Mississippi Sound constitutes historic inland waters overruled, and Special Master's Report to that extent confirmed.

BLACKMUN, J., delivered the opinion of the Court, in which all other Members joined, except MARSHALL, J., who took no part in the consideration or decision of the case.

Deputy Solicitor General Claiborne argued the cause for the United States. With him on the briefs were *Solicitor General Lee, Assistant Attorney General Habicht,* and *Donald A. Carr.*

Jim R. Bruce argued the cause for defendant State of Mississippi. With him on the briefs were *Edwin Lloyd Pittman,* Attorney General, *Herber A. Ladner, Jr.,* and *Thomas Y. Page. Benjamin Cohen,* Special Assistant Attorney General, argued the cause for defendant State of Alabama. With him on the briefs were *Charles A. Graddick,* Attorney General, and *Robert A. Macrory,* Special Assistant Attorney General.*

JUSTICE BLACKMUN delivered the opinion of the Court.

This is the latest chapter in the long-lasting litigation between the Federal Government and the States of the Gulf Coast concerning ownership of the seabed, minerals, and other natural resources underlying the Gulf of Mexico. The particular and narrow issue presented here is whether the waters of Mississippi Sound are inland waters. If the Sound constitutes inland waters, as the States of Alabama and Mississippi contend, then these States own the lands submerged under the Sound. If the Sound in substantial part does not constitute inland waters, as the Government contends, then the United States owns the lands submerged under several "enclaves" of high seas within the Sound. We conclude that Mississippi Sound qualifies as a historic bay, and that the waters of the Sound, therefore, are inland waters.

I

The Submerged Lands Act of 1953, 67 Stat. 29, 43 U. S. C. § 1301 *et seq.*, confirms to each State title to and ownership of

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**Norman C. Gorsuch,* Attorney General, *G. Thomas Koester,* Assistant Attorney General, *John Briscoe,* and *David Ivester* filed a brief for the State of Alaska as *amicus curiae.*

the lands beneath navigable waters within the State's boundaries. § 1311(a). The Act also confirms in each coastal State a seaward boundary three geographical miles distant from its coastline. § 1312. A State bordering on the Gulf of Mexico, however, may be entitled to a historic seaward boundary beyond three geographical miles and up to three marine leagues (approximately nine geographical miles) distant from its coastline. §§ 1301(b), 1312. The Act defines the term "coast line" as "the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters." § 1301(c). The first part of this definition is relatively easy to apply. The second part—requiring determination of "the line marking the seaward limit of inland waters"—is more difficult to apply because the term "inland waters" is not defined in the Act.

In *United States* v. *Louisiana*, 363 U. S. 1 (1960), this Court determined, among other things, that the States of Alabama and Mississippi are not entitled under the Submerged Lands Act to a historic seaward boundary three marine leagues distant from their coastlines. Rather, the Court held, these two States are entitled, as against the United States, to all the lands, minerals, and other natural resources underlying the Gulf of Mexico, extending seaward from their coastlines for a distance of no more than three geographical miles. *Id.*, at 79–82, 83 (opinion); *United States* v. *Louisiana*, 364 U. S. 502, 503 (1960) (decree). The Court, however, did not express any opinion as to the precise location of the coastline from which the 3-mile belt is to be measured. 363 U. S., at 82, nn. 135 and 139. The Court merely noted, in accordance with the above-mentioned definition in § 2(c) of the Submerged Lands Act, 43 U. S. C. § 1301(c), that "the term 'coast line' means the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters." 364 U. S., at 503. See also 363 U. S., at 83. The Court retained jurisdiction to entertain further proceedings, including proceedings to resolve any dispute in locating the relevant coastline. *Ibid.;* 364 U. S., at 504.

As has been noted, locating the coastline requires the determination of the seaward limit of "inland waters." Following the Court's decision in *United States* v. *Louisiana*, a disagreement arose between the United States and the States of Alabama and Mississippi concerning the status of Mississippi Sound as inland waters. The Sound is a body of water immediately south of the mainland of the two States. It extends from Lake Borgne at the west to Mobile Bay at the east, and is bounded on the south by a line of barrier islands. These islands, from west to east, are Isle au Pitre, Cat Island, Ship Island, Horn Island, Petit Bois Island, and Dauphin Island. The Sound is approximately 80 miles long and 10 miles wide.

The two States contend that the whole of Mississippi Sound constitutes "inland waters." Under this view, the coastline of the States consists of the lines of ordinary low water along the southern coasts of the barrier islands together with appropriate lines connecting the barrier islands. These latter lines mark the seaward limit of Mississippi Sound. The United States, on the other hand, denies the inland-water status of Mississippi Sound. Under its view, the coastline of the States generally consists of the lines of ordinary low water along the southern mainland and around each of the barrier islands.[1]

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[1] The United States' position actually is somewhat more complicated. First, the United States concedes that Isle au Pitre may be treated as part of the mainland, and that a bay-closing line may be drawn from the eastern tip of Isle au Pitre to the eastern promontory of St. Louis Bay on the mainland. Thus, the waters of Mississippi Sound west of this bay-closing line are inland waters, and the bay-closing line forms part of the legal coastline

Under the States' view, then, the States own all the lands underlying Mississippi Sound, as well as the lands underlying the Gulf of Mexico extending seaward for a distance of three geographical miles from the southern coasts of the barrier islands and the lines connecting those islands. Under the United States' view, on the other hand, the States own only those lands underlying Mississippi Sound and the Gulf of Mexico that are within three geographical miles of the mainland coast or of the coasts of the barrier islands. There are several areas within Mississippi Sound that are more than three miles from any point on these coasts. Under the United States' view, those areas constitute "enclaves" or pockets of high seas, and the lands underlying them belong to the United States.

To resolve this dispute over the inland-water status of Mississippi Sound, the two States and the United States filed motions and cross-motions for the entry of a supplemental decree. The Court referred these pleadings to its Special Master, the Honorable Walter P. Armstrong, Jr., who already had been appointed in *United States* v. *Louisiana (Louisiana Boundary Case)*, 394 U. S. 11 (1969). See 444 U. S. 1064 (1980); 445 U. S. 923 (1980). See also 457 U. S. 1115 (1982). Following extended proceedings, the Special Master has submitted his Report to this Court.

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of Mississippi. Second, the United States takes the position that if Dauphin Island at Mobile Bay is properly treated as part of the mainland—which the United States disputes—then a bay-closing line may be drawn from the western tip of Dauphin Island northwesterly to Point Aux Chenes on the mainland, just west of the Alabama-Mississippi boundary. Under this secondary or fall-back position of the United States, the waters of Mississippi Sound east of this bay-closing line are inland waters, and the bay-closing line forms part of the legal coastline of Alabama and Mississippi. Finally, there are several undisputed inland rivers and bays along the shores of Alabama and Mississippi, and, as a consequence, undisputed closing lines across the mouths of these rivers and bays that, in the Government's view, form part of the legal coastline of the States.

II

As noted above, the Submerged Lands Act employs but does not define the term "inland waters." In *United States* v. *California*, 381 U. S. 139, 161–167 (1965), this Court observed that Congress had left to the Court the task of defining "inland waters" for purposes of the Submerged Lands Act. The Court for those purposes has adopted the definitions provided in the Convention on the Territorial Sea and the Contiguous Zone, [1964] 15 U. S. T. (pt. 2) 1607, T. I. A. S. No. 5639 (the Convention). 381 U. S., at 165. See also *Louisiana Boundary Case*, 394 U. S., at 35; *United States* v. *Maine (Rhode Island and New York Boundary Case)*, 469 U. S. 504, 513 (1985).

The Convention, however, uses terminology differing somewhat from the terminology of the Submerged Lands Act. In particular, the Convention uses the term "baseline" to refer to the "coast line," and it uses the term "territorial sea" to refer to the 3-geographical-mile belt extending seaward from the coastline. The territorial sea is one of the three zones into which, in international law, the sea is divided. The Court so explained in the *Louisiana Boundary Case:*

> "Under generally accepted principles of international law, the navigable sea is divided into three zones, distinguished by the nature of the control which the contiguous nation can exercise over them. Nearest to the nation's shores are its inland, or internal waters. These are subject to the complete sovereignty of the nation, as much as if they were a part of its land territory, and the coastal nation has the privilege even to exclude foreign vessels altogether. Beyond the inland waters, and measured from their seaward edge, is a belt known as the marginal, or territorial, sea. Within it the coastal nation may exercise extensive control but cannot deny the right of innocent passage to foreign nations. Outside the territorial sea are the high seas, which are

> international waters not subject to the dominion of any single nation." 394 U. S., at 22–23 (footnotes omitted).

Article 3 of the Convention provides the general rule for determining the "baseline":

> "Except where otherwise provided in these articles, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State."

The Convention, however, provides several exceptions to the general rule pursuant to which Mississippi Sound might qualify as inland waters.

First, Article 4 of the Convention permits a nation to employ the method of straight baselines in delimiting its coastline. Article 4(1) provides in pertinent part:

> "In localities where the coast line is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured."

If the method of straight baselines were applied to the coast of Alabama and Mississippi, the coastline would be drawn by connecting the barrier islands, thus enclosing Mississippi Sound as inland waters. The Court has held, however, that the method of straight baselines is applicable only if the Federal Government has chosen to adopt it. See *Louisiana Boundary Case*, 394 U. S., at 72–73; *United States* v. *California*, 381 U. S., at 167–169. In the present case, the Special Master concluded that the United States has not adopted the straight baseline method.

Second, Article 7 of the Convention provides a set of rules for determining whether a body of water qualifies as inland waters because it is a "juridical bay." Under Article 7(2), such a bay is defined to be "a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast." In addition, the area of the indentation must be "as large as, or larger than, that of the semicircle whose diameter is a line drawn across the mouth of that indentation." And the closing line of the bay must not exceed 24 miles. The Special Master concluded that Mississippi Sound satisfies these criteria and thus qualifies as a juridical bay. In reaching this conclusion, the Master determined that Dauphin Island was to be treated as part of the mainland. The closing line drawn from the easternmost point of Isle au Pitre to the westernmost point of Dauphin Island, connecting each of the intervening barrier islands, crosses water gaps totaling less than 24 miles in length.

Finally, Article 7(6) of the Convention indicates that a body of water can qualify as inland waters if it is a "historic bay." The Convention does not define the term "historic bay." The Special Master concluded that Mississippi Sound qualifies as a historic bay under the tests noted in *United States* v. *California*, 381 U. S., at 172, and *United States* v. *Alaska*, 422 U. S. 184, 189 (1975).

The Special Master, accordingly, recommended to this Court that a decree be entered in favor of Alabama and Mississippi.

The United States and the States of Alabama and Mississippi respectively filed exceptions to the Master's Report. The United States argued that the Master erred in concluding that Mississippi Sound is both a juridical bay and a historic bay; it claims that it is neither. Alabama and Mississippi agreed with those conclusions of the Special Master, but argued that there also were alternative grounds for concluding that Mississippi Sound constitutes inland waters. In particular, the States argued that their Acts of Admission established their boundaries along the southern coast of the barrier islands; that Mississippi Sound qualifies as inland waters under the straight baseline method of Article 4 of the Convention and prior United States practice; that Mississippi Sound qualifies as a juridical bay regardless of the characterization of Dauphin Island as a "mainland headland"; and that even if the whole of Mississippi Sound is not a juridical bay, a smaller juridical bay exists at the eastern end of the Sound.

We have independently reviewed the record, as we must. See *Mississippi* v. *Arkansas*, 415 U. S. 289, 291–292, 294 (1974); *Colorado* v. *New Mexico*, 467 U. S. 310, 317 (1984); *Rhode Island and New York Boundary Case*, 469 U. S., at 506. Upon that review, we conclude that the Special Master correctly determined that Mississippi Sound is a historic bay. We therefore need not, and do not, address the exceptions presented by the States of Alabama and Mississippi or those exceptions of the United States that relate to the question whether Mississippi Sound qualifies as a juridical bay under Article 7 of the Convention.

III

The term "historic bay"[2] is not defined in the Convention, and there is no complete accord as to its meaning. The Court has stated that a historic bay is a bay "over which a coastal nation has traditionally asserted and maintained dominion with the acquiescence of foreign nations." *United States* v. *California*, 381 U. S., at 172. See also *United States* v. *Alaska*, 422 U. S., at 189; *Louisiana Boundary Case*, 394 U. S., at 23. The Court also has noted that there appears to be general agreement that at least three factors are to be taken into consideration in determining whether a body of water is a historic bay: (1) the exercise of authority over the area by the claiming nation; (2) the continuity of this exercise of authority; and (3) the acquiescence of foreign nations. See *United States* v. *Alaska*, 422 U. S., at 189; *Louisiana Boundary Case*, 394 U. S., at 23–24, n. 27. An authoritative United Nations study concludes that these three factors require that "the coastal State must have effectively exercised sovereignty over the area continuously during a time sufficient to create a usage and have done so under the general toleration of the community of States." Juridical Regime of Historic Waters, Including Historic Bays 56, U. N. Doc. A/CN.4/143 (1962) (hereinafter Juridical Regime).[3] In addition, there is substantial agreement that a fourth factor to be taken into consideration is the vital interests of the coastal nation, including elements such as geographical configuration, economic interests, and the requirements of self-defense. See *id.*, at 38, 56–58; 1 Shalowitz, at 48–49. See also *Fisheries Case (U. K.* v. *Nor.)*, 1951 I. C. J. 116, 142. In the present case, the facts establish that the United States effectively has exercised sovereignty over Mississippi Sound as inland waters from the time of the Louisiana Purchase in 1803 until 1971, and has done so without protest by foreign nations.

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[2] In this opinion, the term "historic bay" is used interchangeably with the term "historic inland waters." It is clear that a historic bay need not conform to the geographic tests for a juridical bay set forth in Article 7 of the Convention. See *Louisiana Boundary Case*, 394 U. S. 11, 75, n. 100 (1969). In this case, as in that one, we need not decide how unlike a juridical bay a body of water can be and still qualify as a historic bay, for it is clear from the Special Master's Report that, at minimum, Mississippi Sound closely resembles a juridical bay.

A

Mississippi Sound historically has been an intracoastal waterway of commercial and strategic importance to the United States. Conversely, it has been of little significance to foreign nations. The Sound is shallow, ranging in depth generally from 1 to 18 feet except for artificially maintained channels between Cat Island and Ship Island leading to Gulf-port, Miss., and between Horn Island and Petit Bois Island leading to Pascagoula, Miss. Outside those channels, it is not readily navigable for oceangoing vessels. Furthermore, it is a cul de sac, and there is no reason for an oceangoing vessel to enter the Sound except to reach the Gulf ports. The historic importance of Mississippi Sound to vital interests of the United States, and the corresponding insignificance of the Sound to the interests of foreign nations, lend support to the view that Mississippi Sound constitutes inland waters.[4]

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[3] The study explains that "no precise length of time can be indicated as necessary to build the usage on which the historic title must be based. It must remain a matter of judgement when sufficient time has elapsed for the usage to emerge." Juridical Regime, at 45. See also 1 A. Shalowitz, Shore and Sea Boundaries 49 (1962) (hereinafter Shalowitz).

Throughout most of the 19th century, the United States openly recognized Mississippi Sound as an inland waterway of importance for commerce, communications, and defense. Early in this period the Nation took steps to enhance and protect its interests in the Sound. On February 8, 1817, the House of Representatives listed among objects of national importance several "improvements requisite to afford the advantages of internal navigation and intercourse throughout the United States and its Territories," including "as a more distant object, a canal communication, if practicable, from the Altamaha and its waters to Mobile, and from thence to the Mississippi." H. R. Doc. No. 427, 14th Cong., 2d Sess., reprinted in 2 American State Papers 420, 422 (1834). This project ultimately became the Intracoastal Waterway through Mississippi Sound. On February 28, 1822, the House Committee on Military Affairs issued a Report that recognized the importance of the intracoastal communication between New Orleans and Mobile Bay through what an 1820 letter reprinted in the Report described as "the little interior sea, comprised between the main and the chain of islands, bounded by Cat Island to the west, and Dauphin Island to the east." H. R. Rep. No. 51, 17th Cong., 1st Sess., 7.

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[4] United States Attorney General Edmund Randolph long ago employed similar reasoning in his opinion that Delaware Bay constitutes inland waters:

"These remarks may be enforced by asking, What nation can be injured in its rights by the Delaware being appropriated to the United States? And to what degree may not the United States be injured, on the contrary ground? It communicates with no foreign dominion; no foreign nation has ever before had a community of right in it, as if it were a main sea; under the former and present governments, the exclusive jurisdiction has been asserted." 1 Op. Atty. Gen. 32, 37 (1793).

Defense of this important waterway has been a longstanding concern of the United States. On April 20, 1836, the Senate passed a resolution calling upon the Secretary of War to survey the most eligible sites for a fortification suitable for the defense of Mississippi Sound and the commerce along it. See S. Rep. No. 490, 26th Cong., 1st Sess., 1 (1840). A subsequent resolution instructed the Senate Committee on Military Affairs to study the expediency of erecting a fort on the western extremity of Ship Island. See S. Rep. No. 618, 26th Cong., 1st Sess., 1 (1840). In response to an inquiry pursuant to this resolution, the War Department noted: "The defenses indicated would cover one of the channels leading from the gulf into the broad interior water communication extending from Lake Borgne to the bay of Mobile." *Id.*, at 2.[5]

Ship Island was reserved for military purposes by an Executive Order of August 30, 1847. In 1858, the War Department, responsive to an appropriation made by Congress, see the Act of Mar. 3, 1857, 11 Stat. 191, 192, authorized the building of a fort on the island. It was to be constructed at the island's west end, and to command the pass into Mississippi Sound between Ship and Cat Islands. Forty-eight cannons were ordered to arm the fort. During the War Between the States, the fort was occupied alternately by Union and Confederate troops. It was finally abandoned in 1875. In 1879, the United States erected a lighthouse on the central section of the island.[6]

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[5] Ten years later, the Senate Committee on Military Affairs noted:

"The broad sheet of water which lies between the coast of Mississippi and the chain of islands parallel to it, is the channel of a commerce important in peace and indispensable in war. Through this passes the inland navigation which connects New Orleans and Mobile. This is the route of the mails and of a large part of the travel between the eastern and southwestern sections of the Union. Through this channel supplies for the naval station at Pensacola are most readily drawn from the great storehouse, the valley of the Mississippi, and its importance in this respect would be increased in a two-fold degree by the contingency of a maritime war: first, because a war would increase the requisite amount of supplies at that station; and, secondly, because it would greatly augment the difficulties of the more extended and exposed lines of communication by exterior navigation." S. Rep. No. 23, 31st Cong., 1st Sess., 2 (1850).

The United States argues that this official recognition of Mississippi Sound as an internal waterway of commercial and strategic importance has no relevance to the Sound's status as a historic bay. It would support this argument with a citation to the 1962 United Nations study of historic waters. Juridical Regime, at 56–58. The cited pages of the study discuss the view taken by some authors and governments that such circumstances as geographic configuration, requirements of self-defense, or other vital interests of the coastal state may justify a claim to historic-bay status without the necessity of establishing long usage. The study notes, *id.*, at 58, that "[t]here is undoubtedly some justification for this view," but ultimately suggests that it does not make sense for "historic title" to be claimed in circumstances where the historic element is wholly absent. *Ibid.* The study, however, does not suggest that such circumstances as geographic configuration and vital interests are irrelevant to the question whether a body of water is a historic bay and, indeed, it affirmatively indicates that such circumstances can fortify a claim to "historic bay" status that is based on usage.[7]

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[6] See generally Report of Special Master 38; Caraway, The Story of Ship Island, 1699–1941, 4 J. Miss. Hist. 76 (1942); Weinert, The Neglected Key to the Gulf Coast, 31 J. Miss. Hist. 269 (1969).

The United States argues that the fortification of Ship Island is relevant only to the United States' suppression of its civil insurrection. But the fort was planned and construction was begun years before the outbreak of the Civil War, and it was not abandoned until some years after the conclusion of that War. The United States further argues that the abandonment of the fort suggests a retreat from any claim of inland-water status for Mississippi Sound. But it seems just as likely, and perhaps more likely, that the fort eventually was abandoned because foreign nations completely acquiesced in the United States' assertion of sovereignty over the Sound, rendering the fort unnecessary.

In any event, the evidence discussed above does not merely demonstrate that Mississippi Sound is presently important to vital interests of the United States. Rather, the evidence demonstrates that the United States historically and expressly has recognized Mississippi Sound as an important internal waterway and has exercised sovereignty over the Sound on that basis throughout much of the 19th century.

B

The United States continued openly to assert the inland water status of Mississippi Sound throughout the 20th century until 1971. Prior to its ratification of the Convention on March 24, 1961,[8] the United States had adopted a policy of enclosing as inland waters those areas between the mainland and off-lying islands that were so closely grouped that no entrance exceeded 10 geographical miles.[9] This 10-mile rule represented the publicly stated policy of the United States at least since the time of the Alaska Boundary Arbitration in 1903. There is no doubt that foreign nations were aware that the United States had adopted this policy. Indeed, the United States' policy was cited and discussed at length by both the United Kingdom and Norway in the celebrated *Fisheries Case (U. K.* v. *Nor.)*, 1951 I. C. J. 116.[10] Nor is there any doubt, under the stipulations of the parties in this case, that Mississippi Sound constitutes inland waters under that view.

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[7] The study cites Bourquin as a proponent of the view that "[t]he character of a bay depends on a combination of geographical, political, economic, historical and other circumstances." Juridical Regime, at 25 (translating and quoting Bourquin, Les Baies Historiques, in Mélanges Georges Sauser-Hall 42 (1952)). Bourquin explains:

> "Where long usage is invoked by a State, it is a ground additional to the other grounds on which its claim is based. In justification of its claim, it will be able to point not only to the configuration of the bay, to the bay's economic importance to it, to its need to control the bay in order to protect its territory, etc., but also to the fact that its acts with respect to the bay have always been those of the sovereign and that its rights are thus confirmed by historical tradition." Juridical Regime, at 25–26.

[8] The Convention did not go into effect, however, until September 10, 1964, when the requisite number of nations had ratified it.

[9] The United States confirmed this policy in a number of official communications during the period from 1951 to 1961. See Report of Special Master 48–54. Also, the United States followed this policy in drawing the Chapman line along the Louisiana coast following the decision in *United States* v. *Louisiana*, 339 U. S. 699 (1950). See 1 Shalowitz, at 161. In a letter to Governor Wright of Mississippi, written on October 17, 1951,

The United States contends that its earlier adoption of and adherence to a general formulation of coastline delimitation under which Mississippi Sound would have qualified as inland waters is not a sufficiently specific claim to the Sound as inland waters to establish it as a historic bay. In the present case, however, the general principles in fact were coupled with specific assertions of the status of the Sound as inland waters. The earliest such assertion in the 20th century occurred in *Louisiana* v. *Mississippi*, 202 U. S. 1 (1906). In that case, the Court determined the location of the boundary between Louisiana and Mississippi in the waters of Lake Borgne and Mississippi Sound. The Court described the Sound as "an inclosed arm of the sea, wholly within the United States, and formed by a chain of large islands, extending westward from Mobile, Alabama, to Cat Island. The openings from this body of water into the Gulf are neither of them six miles wide." *Id.*, at 48. The Court ruled that the doctrine of "thalweg" was applicable to determine the exact location of the boundary separating Louisiana from

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Oscar L. Chapman, then Secretary of the Interior, indicated that if the Chapman line were extended eastward beyond the Louisiana border, it would enclose Mississippi Sound as inland waters.

[10] It is noteworthy that in the *Fisheries Case*, the International Court of Justice ruled that the consistent and prolonged application of the Norwegian system of delimiting inland waters, combined with the general toleration of foreign states, gave rise to a historic right to apply the system. See 1951 I. C. J., at 138–139.

Mississippi in Lake Borgne and Mississippi Sound. Under that doctrine, the water boundary between States is defined as the middle of the deepest or most navigable channel, as distinguished from the geographic center or a line midway between the banks. See *Texas* v. *Louisiana*, 410 U. S. 702, 709–710 (1973); *Louisiana* v. *Mississippi*, 466 U. S. 96, 99–101 (1984). The Court concluded that the "principle of thalweg is applicable," not only to navigable rivers, but also to "sounds, bays, straits, gulfs, estuaries and other arms of the sea." 202 U. S., at 50. The Court rejected the contention that the doctrine did not apply in Lake Borgne and Mississippi Sound because those bodies were "open sea." *Id.*, at 51–52. The Court noted that the record showed that Lake Borgne and the relevant part of Mississippi Sound are not open sea but "a very shallow arm of the sea, having outside of the deep water channel an inconsiderable depth." *Id.*, at 52. The Court clearly treated Mississippi Sound as inland waters, under the category of "bays wholly within [the Nation's] territory not exceeding two marine leagues in width at the mouth." *Ibid.*

The United States argues that the language in *Louisiana* v. *Mississippi* does not constitute a holding that Mississippi Sound is inland waters. It appears to us, however, that the Court's conclusion that the Sound is inland waters was essential to its ruling that the doctrine of thalweg was applicable. The United States also argues that it cannot be bound by the holding because it was not a party in that case. The significance of the holding for the present case, however, is not its effect as precedent in domestic law, but rather its effect on foreign nations that would be put on notice by the decision that the United States considered Mississippi Sound to be inland waters.

If foreign nations retained any doubt after *Louisiana* v. *Mississippi* that the official policy of the United States was to recognize Mississippi Sound as inland waters, that doubt must have been eliminated by the unequivocal declaration of the inland-water status of Mississippi Sound by the United States in an earlier phase of this very litigation.[11] In a brief filed with this Court on May 15, 1958, the United States noted:

> "[W]e need not consider whether the language, 'including the islands' etc., would of itself include the water area intervening between the islands and the mainland (though we believe it would not), because it happens that all the water so situated in Mississippi is in Mississippi Sound, which this Court has described as inland water. *Louisiana* v. *Mississippi*, 202 U. S. 1, 48. The bed of these inland waters passed to the State on its entry into the Union. *Pollard's Lessee* v. *Hagan*, 3 How. 212." Brief for United States in Support of Motion for Judgment on Amended Complaint in *United States* v. *Louisiana*, O. T. 1958, No. 10 Orig., p. 254.[12]

Similarly, in discussing Alabama's entitlement to submerged lands, the United States conceded that "the water between the islands and the Alabama mainland is inland water; consequently, we do not question that the land under it belongs to the State." *Id.*, at 261.

The United States argues that the States cannot now invoke estoppel based on the Federal Government's earlier construction of *Louisiana* v. *Mississippi* as describing Mississippi Sound as inland waters. The United States points out that the Court in the *Louisiana Boundary Case*, 394

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[11] The United States also acknowledged that Mississippi Sound constitutes inland waters in a letter written by the Secretary of the Interior to the Governor of Mississippi on October 17, 1951, confirming that the oil and gas leasing rights inside the barrier islands belonged to the State of Mississippi. Report of Special Master 42–44.

[12] In *United States* v. *Louisiana*, 363 U. S. 1 (1960), Alabama and Mississippi argued that language in their Acts of Admission and in other historic documents entitled them to ownership of all submerged lands located within three marine leagues of their coastlines. See *id.*, at 79–82.

U. S., at 73–74, n. 97, concluded that a similar concession with respect to Louisiana was not binding on the United States. As with the Court's holding in 1906 in *Louisiana* v. *Mississippi*, however, the significance of the United States' concession in 1958 is not that it has binding effect in domestic law, but that it represents a public acknowledgment of the official view that Mississippi Sound constitutes inland waters of the Nation.

C

In addition to showing continuous exercise of authority over Mississippi Sound as inland waters, the States must show that foreign nations acquiesced in, or tolerated, this exercise. It is uncontested that no foreign government has ever protested the United States' claim to Mississippi Sound as inland waters. This is not surprising in light of the geography of the coast, the shallowness of the waters, and the absence of international shipping lanes in the vicinity. Scholarly comment is divided over whether the mere absence of opposition suffices to establish title. See *United States* v. *Alaska*, 422 U. S., at 189, n. 8, 199–200; *Louisiana Boundary Case*, 394 U. S., at 23–24, n. 27. In *United States* v. *Alaska*, this Court held that, under the circumstances of that case, mere failure to object was insufficient because it had not been shown that foreign governments knew or reasonably should have known of the authority being asserted. There is substantial agreement that when foreign governments do know or have reason to know of the effective and continual exercise of sovereignty over a maritime area, inaction or toleration on the part of the foreign governments is sufficient to permit a historic title to arise. See Juridical Regime, at 48–49. See also *Fisheries Case (U. K.* v. *Nor.)*, 1951 I. C. J., at 138–139. Moreover, it is necessary to prove only open and public exercise of sovereignty, not actual knowledge by the foreign governments. See Juridical Regime, at 54–55. In the present case, the United States publicly and unequivocally stated that it considered Mississippi Sound to be inland waters. We conclude that under these circumstances the failure of foreign governments to protest is sufficient proof of the acquiescence or toleration necessary to historic title.

IV

The United States contends that, notwithstanding the substantial evidence discussed above of the Government's assertion of sovereignty over Mississippi Sound as inland waters, the States have failed to satisfy their burden of proof that Mississippi Sound is a historic bay. The United States relies on its recent disclaimer of the inland-water status of the Sound and on the absence of any evidence of actual exclusion from the Sound of foreign navigation in innocent passage. We find neither of these points persuasive.

A

In April 1971, the United States for the first time publicly disclaimed the inland-water status of Mississippi Sound by publishing a set of maps delineating the 3-mile territorial sea and certain inland waters of the United States. These maps, which include the entire Gulf Coast, have been distributed to foreign governments in response to requests made upon the Department of State for documents delimiting the boundaries of the United States.

This Court repeatedly has made clear that the United States' disclaimer of historic inland-water status will not invariably be given decisive weight. In *United States* v. *California*, 381 U. S., at 175, the Court gave decisive effect to a disclaimer of historic inland-water status by the United States only because the case involved "questionable evidence of continuous and exclusive assertions of dominion over the disputed waters." The Court suggested, however, that such a disclaimer would not be decisive in a case in which the historic evidence was "clear beyond doubt." *Ibid.* The Court also suggested that "a contraction of a State's recognized territory imposed by the Federal Government in the name of foreign policy would be highly questionable." *Id.*, at 168. See *Geofroy* v. *Riggs*, 133 U. S. 258, 267 (1890). The Court reiterated this latter theme in the *Louisiana Boundary Case*, where it stated:

> "It is one thing to say that the United States should not be required to take the novel, affirmative step of adding to its territory by drawing straight baselines. It would be quite another to allow the United States to prevent recognition of a historic title which may already have ripened because of *past* events but which is called into question for the first time in a domestic lawsuit. The latter, we believe, would approach an impermissible contraction of territory against which we cautioned in *United States* v. *California*." 394 U. S., at 77, n. 104 (emphasis in original).

The maps constituting the disclaimer in the present case were published more than 2 years after the decree in the *Louisiana Boundary Case*, and 11 years after the decision in *United States* v. *Louisiana*, 363 U. S. 1 (1960). The Special Master concluded that "under the circumstances it is difficult to accept the disclaimer as entirely extrajudicial in its motivation." Report of Special Master 47. Rather, according to the Master, the disclaimer "would appear to be more in the nature of an attempt by the United States to prevent recognition of any pre-existing historic title which might already have ripened because of past events but which was called into question for the first time in a domestic lawsuit." *Ibid.*

We conclude that historic title to Mississippi Sound as inland waters had ripened prior to the United States' ratification of the Convention in 1961 and prior to its disclaimer of the inland-water status of the Sound in 1971. That disclaimer, issued while the Court retained jurisdiction to resolve disputes concerning the location of the coastline of the Gulf Coast States, is insufficient to divest the States of their entitlement to the submerged lands under Mississippi Sound.

B

Finally, the United States argues that proof of historic inland-water status requires a showing that sovereignty was exerted to exclude from the area all foreign navigation in innocent passage. This argument is based on the principle that a coastal nation has the privilege to exclude innocent-passage foreign navigation from its inland waters, but not from its territorial sea. See *Louisiana Boundary Case*, 394 U. S., at 22. According to the United States, such exclusion is therefore the only conduct that conclusively demonstrates that the nation exercises authority over the waters in question as inland waters and not merely as territorial sea.

This rigid view of the requirements for establishing historic inland-water status is unrealistic and is supported neither by the Court's precedents[13] nor by writers on international law.[14] To the contrary, in advocating a flexible approach to appraisal of the factors necessary to a valid claim of historic inland-waters status, two leading commentators have stated: "A relatively relaxed interpretation of the evidence of historic assertion and of the general acquiescence of other states seems more consonant with the frequently amorphous character of the facts available to support these claims than a rigidly imposed requirement of certainty of proof, which must inevitably demand more than the realities of international life could ever yield." M. McDougal & W. Burke, The Public Order of the Oceans 372 (1962). Similarly the 1962 United Nations study of historic waters notes that the requirement of effective exercise of sovereignty over the area by the appropriate action on the part of the claiming state

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[13] In *United States* v. *Alaska*, 422 U. S. 184, 197 (1975), the Court noted that to establish historic title to a body of water as inland waters, "the exercise of sovereignty must have been, historically, an assertion of power to exclude all foreign vessels and navigation." It is clear, however, that a nation can assert power to exclude foreign navigation in ways other than by actual resort to the use of that power in specific instances.

[14] One prominent writer has explained the "actes d'appropriation" necessary to establish effective exercise of sovereignty as follows:

"It is hard to specify categorically what kind of acts of appropriation constitute sufficient evidence: the exclusion from these areas of foreign vessels or their subjection to rules imposed by the coastal State which exceed the normal scope of regulation made in the interests of navigation would obviously be acts affording convincing evidence of the State's intent. It would, however, be too strict to insist that only such acts constitute evidence. In the Grisbadarna dispute between Sweden and Norway, the judgement of 23 October 1909 mentions that 'Sweden has performed various acts . . . owing to her conviction that these regions were Swedish, as, for instance, the placing of beacons, the measurement of the sea, and the installation of a light-boat, being acts which involved considerable expense and in doing which she not only thought that she was exercising her right but even more that she was performing her duty.'" 3 Gidel, Droit International Public de la Mer 633 (1934), translated and quoted in Juridical Regime, at 41.

> "does not, however, imply that the State necessarily must have undertaken concrete action to enforce its relevant laws and regulations within or with respect to the area claimed. It is not impossible that these laws and regulations were respected without the State having to resort to particular acts of enforcement. It is, however, essential that, to the extent that action on the part of the State and its organs was necessary to maintain authority over the area, such action was undertaken." Juridical Regime, at 43.

Thus, although a coastal nation has the privilege to exclude from its inland waters foreign vessels in innocent passage, the need to exercise that privilege may never arise. Indeed, in the present case, as the United States seems to concede, the record does not indicate that there ever was any occasion to exclude from Mississippi Sound foreign vessels in innocent passage. Tr. of Oral Arg. 16. This is not surprising since, as noted above, foreign nations have little interest in Mississippi Sound and have acquiesced willingly in the United States' express assertions of sovereignty over the Sound as inland waters. We conclude that the absence in the record of evidence of any occasion for the United States to have exercised its privilege to exclude foreign navigation in innocent passage from Mississippi Sound supports rather than disproves the claim of historic title to the Sound as inland waters.

V

In sum, we conclude that the evidence discussed in the Report of the Special Master and in Part III above, considered in its entirety, is sufficient to establish that Mississippi Sound constitutes a historic bay. The exception of the United States to the Special Master's recommended ruling that the whole of Mississippi Sound constitutes historic inland waters is overruled. We repeat that we do not address the exceptions of Alabama, or those of Mississippi, or the exceptions of the United States that relate to the question whether Mississippi Sound qualifies as a juridical bay. The recommendations of the Special Master and his Report, to the extent they are consistent with this opinion, are respectively adopted and confirmed. The parties are directed promptly to submit to the Special Master a proposed appropriate decree for this Court's consideration; if the parties are unable to agree upon the form of the decree, each shall submit its proposal to the Master for his consideration and recommendation. Each party shall bear its own costs; the actual expenses of the Special Master shall be borne half by the United States and half by Alabama and Mississippi.

The Court retains jurisdiction to entertain such further proceedings, enter such orders, and issue such writs as from time to time may be determined necessary or advisable to effectuate and supplement the forthcoming decree and the rights of the respective parties.

It is so ordered.

JUSTICE MARSHALL took no part in the consideration or decision of this case.

CHEMICAL MANUFACTURERS ASSOCIATION ET AL. *v.* NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 83–1013. Argued November 6, 1984—Decided February 27, 1985*

Under the Clean Water Act (Act), the Environmental Protection Agency (EPA) is required to promulgate regulations establishing categories of pollution sources and setting effluent limitations for those categories. Because of the difficulties involved in collecting adequate information to promulgate regulations, EPA has developed a "fundamentally different factor" (FDF) variance as a mechanism for ensuring that its necessarily rough-hewn categories of sources do not unfairly burden atypical dischargers of waste. Any interested party may seek an FDF variance to make effluent limitations either more or less stringent if the standards applied to a given source, because of factors fundamentally different from those considered by EPA in setting the limitation, are either too lenient or too strict. In a consolidated lawsuit, the Court of Appeals held that EPA was barred from issuing FDF variances from toxic pollutant effluent limitations by § 301(l) of the Act, which provides that EPA may not "modify" any effluent-limitation requirement of § 301 insofar as toxic materials are concerned. The court rejected EPA's view that § 301(l) prohibits only modifications as to toxic materials otherwise permitted by other provisions of § 301 on economic or water-quality grounds, and that § 301(l) does not address the issue of FDF variances.

Held: The view of the agency charged with administering the statute is entitled to considerable deference, and EPA's understanding of the statute is sufficiently rational to preclude a court from substituting its judgment for that of EPA. Pp. 125–133.

(a) The statutory language does not foreclose EPA's view of the statute. Although the word "modify," if read in its broadest sense in § 301(l), would encompass any change in effluent limitations, it makes little sense to construe the section to forbid EPA to amend its own standards, even to correct an error or to impose stricter requirements. The word "modify" has no plain meaning as used in § 301(l), and is the proper subject of construction by EPA and the courts. Pp. 125–126.

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*Together with No. 83–1373, *United States Environmental Protection Agency* v. *Natural Resources Defense Council, Inc., et al.*, also on certiorari to the same court.

(b) The legislative history does not evince an unambiguous congressional intent to forbid FDF waivers with respect to toxic materials. An indication that Congress did not intend to forbid FDF waivers is its silence on the issue when it amended § 301 with regard to waivers on other grounds. Pp. 126–129.

(c) EPA's construction of § 301(l) as not prohibiting FDF variances is consistent with the Act's goals and operation. EPA's regulation as to such variances explains that its purpose is to remedy categories that were not accurately drawn because information was either not available to or not considered by EPA in setting the original categories and limitations. An FDF variance does not excuse compliance with a correct requirement, but instead represents an acknowledgment that not all relevant factors were taken sufficiently into account in framing that requirement originally, and that those relevant factors, properly considered, would have justified—indeed, required—the creation of a subcategory for the discharger in question. The availability of FDF variances makes bearable the enormous burden faced by EPA in promulgating categories of sources and setting effluent limitations. Pp. 129–133.

719 F. 2d 624, reversed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, POWELL, and REHNQUIST, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BLACKMUN and STEVENS, JJ., joined, and in Parts I, II, and III of which O'CONNOR, J., joined, *post*, p. 134. O'CONNOR, J., filed a dissenting opinion, *post*, p. 165.

Samuel A. Alito, Jr., argued the cause for petitioners in both cases and filed briefs for petitioner in No. 83–1373. With him on the briefs were *Solicitor General Lee*, *Assistant Attorney General Habicht*, and *Deputy Solicitor General Claiborne*. *Theodore L. Garrett* filed briefs for petitioners in No. 83–1013.

Frances Dubrowski argued the cause for respondents in both cases and filed a brief for respondent Natural Resources Defense Council, Inc.†

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†*Robin S. Conrad* and *Stephen A. Bokat* filed a brief for the Chamber of Commerce of the United States as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the State of New York by *Robert Abrams*, Attorney General, *Peter H. Schiff*, and *James A. Sevinsky* and *Kathleen Liston Morrison*, Assistant Attorneys General;

JUSTICE WHITE delivered the opinion of the Court.

These cases present the question whether the Environmental Protection Agency (EPA) may issue certain variances from toxic pollutant effluent limitations promulgated under the Clean Water Act, 86 Stat. 816, as amended, 33 U. S. C. § 1251 *et seq.*[1]

I

As part of a consolidated lawsuit, respondent Natural Resources Defense Council (NRDC) sought a declaration that § 301(l) of the Clean Water Act, 33 U. S. C. § 1311(*l*), prohibited EPA from issuing "fundamentally different factor" (FDF) variances for pollutants listed as toxic under the Act.[2] Petitioners EPA and Chemical Manufacturers Association (CMA) argued otherwise. To understand the nature of this controversy, some background with respect to the statute and the case law is necessary.

The Clean Water Act, the basic federal legislation dealing with water pollution, assumed its present form as the result of extensive amendments in 1972 and 1977. For direct dischargers—those who expel waste directly into navigable waters—the Act calls for a two-phase program of technology-based effluent limitations, commanding that dischargers comply with the best practicable control technology currently available (BPT) by July 1, 1977, and subsequently meet the generally more stringent effluent standard consistent with the best available technology economically achievable (BAT).[3]

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and for the Southeastern Fisheries Association, Inc., by *Eldon V. C. Greenberg.*

[1] Hereinafter, the Clean Water Act will be referred to, interchangeably, by its entire name or simply as the Act.

[2] EPA is required, under § 307(a)(1) of the Act, 33 U. S. C. § 1317(a)(1), to publish a list of toxic pollutants. Upon designation of a pollutant as toxic, § 307(a)(2), 33 U. S. C. § 1317(a)(2), requires EPA to set standards for its discharge.

[3] See *E. I. du Pont de Nemours & Co.* v. *Train*, 430 U. S. 112, 121 (1977). BAT standards are set on the basis of categories and classes of

Indirect dischargers—those whose waste water passes through publicly owned treatment plants—are similarly required to comply with pretreatment standards promulgated by EPA under § 307 of the Act, 33 U. S. C. § 1317(b), for pollutants not susceptible to treatment by sewage systems or which would interfere with the operation of those systems. Relying upon legislative history suggesting that pretreatment standards are to be comparable to limitations for direct dischargers, see H. R. Rep. No. 95–830, p. 87 (1977), and pursuant to a consent decree,[4] EPA has set effluent limitations for indirect dischargers under the same two-phase approach applied to those discharging waste directly into navigable waters.

Thus, for both direct and indirect dischargers, EPA considers specific statutory factors[5] and promulgates regulations creating categories and classes of sources and setting uniform discharge limitations for those classes and categories. Since

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sources under rules promulgated by the EPA under § 304(b), 33 U. S. C. § 1314(b). Although the statute indicated that BPT standards be established for point sources, rather than categories of sources, we held in *Du Pont* that the EPA could also set BPT limitations on the basis of classes and categories, as long as allowance was made for variations in individual plants through a variance procedure. 430 U. S., at 128.

[4] Lawsuits by NRDC resulted in a consent decree placing EPA under deadlines for promulgating categorical pretreatment standards based on BPT and BAT criteria. *NRDC* v. *Train*, 8 ERC 2120, 6 Env. L. Rep. 20588 (DC 1976), modified *sub nom. NRDC* v. *Costle*, 12 ERC 1833, 9 Env. L. Rep. 20176 (DC 1979), modified *sub nom. NRDC* v. *Gorsuch*, No. 72–2153 (Oct. 26, 1982), modified *sub nom. NRDC* v. *Ruckelshaus*, No. 73–2153 (Aug. 2, 1983), and 14 Env. L. Rep. 20185 (1984). In the 1977 amendments to the Act, Congress sanctioned this approach to establishing pretreatment standards for indirect dischargers. *Environmental Defense Fund, Inc.* v. *Costle*, 205 U. S. App. D. C. 101, 115–116, 636 F. 2d 1229, 1243–1244 (1980).

[5] The factors relating to the assessment of BAT standards, set out in § 304(b)(2)(B) of the Act, include the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, the cost of achieving effluent reduction, and nonwater-quality environmental impacts. 33 U. S. C. § 1314(b)(2)(B).

application of the statutory factors varies on the basis of the industrial process used and a variety of other factors, EPA has faced substantial burdens in collecting information adequate to create categories and classes suitable for uniform effluent limits, a burden complicated by the time deadlines it has been under to accomplish the task.[6] Some plants may find themselves classified within a category of sources from which they are, or claim to be, fundamentally different in terms of the statutory factors. As a result, EPA has developed its FDF variance as a mechanism for ensuring that its necessarily rough-hewn categories do not unfairly burden atypical plants.[7] Any interested party may seek an FDF variance to make effluent limitations either more or less stringent if the standards applied to a given source, because of factors fundamentally different from those considered by

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[6] See n. 4, *supra.*

[7] The challenged FDF variance regulation with respect to indirect dischargers, 40 CFR § 403.13 (1984), provides in relevant part:

"§ 403.13 Variances from categorical pretreatment standards for fundamentally different factors.

"(a) *Definition.* The term 'Requester' means an Industrial User or a [publicly owned treatment work] or other interested person seeking a variance from the limits specified in a categorical Pretreatment Standard.

"(b) *Purpose and scope.* (1) In establishing categorical Pretreatment Standards for existing sources, the EPA will take into account all the information it can collect, develop and solicit regarding the factors relevant to pretreatment standards under section 307(b). In some cases, information which may affect these Pretreatment Standards will not be available or, for other reasons, will not be considered during their development. As a result, it may be necessary on a case-by-case basis to adjust the limits in categorical Pretreatment Standards, making them either more or less stringent, as they apply to a certain Industrial User within an industrial category or subcategory. This will only be done if data specific to that Industrial User indicates it presents factors fundamentally different from those considered by EPA in developing the limit at issue. Any interested person believing that factors relating to an Industrial User are fundamentally different from the factors considered during development of a categorical Pretreatment Standard applicable to that User and further, that the existence of those factors justifies a different discharge limit from that specified in the applicable categorical Pretreatment Standard, may request a fundamentally different factors variance under this section or such a variance request may be initiated by the EPA.

. . . . .

"(c) *Criteria*—(1) *General Criteria.* A request for a variance based upon fundamentally different factors shall be approved only if:

"(i) There is an applicable categorical Pretreatment Standard which specifically controls the pollutant for which alternative limits have been requested; and

"(ii) Factors relating to the discharge controlled by the categorical Pretreatment Standard are fundamentally different from the factors considered by EPA in establishing the Standards; and

"(iii) The request for a variance is made in accordance with [applicable procedural requirements].

"(2) *Criteria applicable to less stringent limits.* A variance request for the establishment of limits less stringent than required by the Standard shall be approved only if:

"(i) The alternative limit requested is no less stringent than justified by the fundamental difference;

"(ii) The alternative limit will not result in a violation of prohibitive discharge standards prescribed by or established under § 403.5;

"(iii) The alternative limit will not result in a non-water quality environmental impact (including energy requirements) fundamentally more adverse than the impact considered during development of the Pretreatment Standards; and

"(iv) Compliance with the Standards (either by using the technologies upon which the Standards are based or by using other control alternatives) would result in either:

"(A) A removal cost (adjusted for inflation) wholly out of proportion to the removal cost considered during development of the Standards; or

"(B) A non-water quality environmental impact (including energy requirements) fundamentally more adverse than the impact considered during development of the Standards.

"(3) *Criteria applicable to more stringent limits.* A variance request for the establishment of limits more stringent than required by the Standards shall be approved only if:

"(i) The alternative limit request is no more stringent than justified by the fundamental difference; and

"(ii) Compliance with the alternative limit would not result in either:

"(A) A removal cost (adjusted for inflation) wholly out of proportion to the removal cost considered during development of the Standards; or

"(B) A non-water quality environmental impact (including energy requirements) fundamentally more adverse than the impact considered during development of the Standards.

[Footnote 7 is continued on p. 122]

EPA in setting the limitation, are either too lenient or too strict.[8]

The 1977 amendments to the Clean Water Act reflected Congress' increased concern with the dangers of toxic pollutants. The Act, as then amended, allows specific statutory modifications of effluent limitations for economic and water-

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"(d) *Factors considered fundamentally different.* Factors which may be considered fundamentally different are:

"(1) The nature or quality of pollutants contained in the raw waste load of the User's process wastewater:

"(2) The volume of the User's process wastewater and effluent discharged;

"(3) Non-water quality environmental impact of control and treatment of the User's raw waste load;

"(4) Energy requirements of the application of control and treatment technology;

"(5) Age, size, land availability, and configuration as they relate to the User's equipment or facilities; processes employed; process changes; and engineering aspects of the application of control technology;

"(6) Cost of compliance with required control technology.

"(e) *Factors which will not be considered fundamentally different.* A variance request or portion of such a request under this section may not be granted on any of the following grounds:

"(1) The feasibility of installing the required waste treatment equipment within the time the Act allows;

"(2) The assertion that the Standards cannot be achieved with the appropriate waste treatment facilities installed, if such assertion is not based on factors listed in paragraph (d) of this section;

"(3) The User's ability to pay for the required waste treatment; or

"(4) The impact of a Discharge on the quality of the [publicly owned treatment works'] receiving waters."

The regulation also provides for public notice of the FDF application and opportunity for public comments and a public hearing. EPA has promulgated an analogous provision for direct dischargers, 40 CFR § 125.30 (1984).

[8] Sources subject to new source performance standards (NSPS) under the Act are those who begin construction after the publication of proposed new source standards, 33 U. S. C. § 1316, and they are ineligible for FDF variances. See 40 CFR § 403.13(b) (1984).

quality reasons in §§ 301(c) and (g).[9] Section 301(l), however, added by the 1977 amendments, provides:

> "The Administrator may not modify any requirement of this section as it applies to any specific pollutant which is on the toxic pollutant list under section 307(a)(1) of this Act." 91 Stat. 1590.

In the aftermath of the 1977 amendments, EPA continued its practice of occasionally granting FDF variances for BPT requirements. The Agency also promulgated regulations explicitly allowing FDF variances for pretreatment standards[10] and BAT requirements.[11] Under these regulations, EPA granted FDF variances, but infrequently.[12]

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[9] 33 U. S. C. §§ 1311(c) and (g). Those provisions explain in relevant part:

"(c) The Administrator may modify the requirements of [§ 301's effluent limitations] with respect to any point source for which a permit application is filed after July 1, 1977, upon a showing by the owner or operator of such point source satisfactory to the Administrator that such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants.

. . . . .

"(g)(1) The Administrator, with the concurrence of the State, shall modify the requirements of [§ 301's effluent limitations] with respect to the discharge of any pollutant (other than pollutants identified pursuant to section 1314(a)(4) of this title, toxic pollutants subject to section 1317(a) of this title, and the thermal component of discharges) from any point source upon a showing by the owner or operator of such a point source satisfactory to the Administrator that—

. . . . .

"(C) such modification will not interfere with the attainment or maintenance of that water quality which shall assure protection of public water supplies, and the protection and propagation of a balanced population of shellfish, fish, and wildlife, and allow recreational activities, in and on the water and such modification will not result in the discharge of pollutants in quantities which may reasonably be anticipated to pose an unacceptable risk to human health or the environment . . . ."

EPA and NRDC appear to be at odds as to whether § 301(c) and § 301(g) modifications are available to indirect dischargers as well as direct dischargers. Compare Brief for EPA 33, n. 23, and Reply Brief for EPA 2–3, with Brief for NRDC 29, and n. 41. Resolution of the seeming disagreement is not necessary to adjudicate these cases.

As part of its consolidated lawsuit, respondent NRDC here challenged pretreatment standards for indirect dischargers and sought a declaration that § 301(l) barred any FDF variance with respect to toxic pollutants.[13] In an earlier case, the Fourth Circuit had rejected a similar argument, finding that § 301(l) was ambiguous on the issue of whether it applied to FDF variances and therefore deferring to the administrative agency's interpretation that such variances were permitted. *Appalachian Power Co.* v. *Train*, 620 F. 2d 1040, 1047–1048 (1980). Contrariwise, the Third Circuit here ruled in favor of NRDC, and against petitioners EPA and CMA, holding that § 301(l) forbids the issuance of FDF variances for toxic pollutants. *National Assn. of Metal Finish-*

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[10] 40 CFR § 403.13 (1984). This variance regulation was issued on June 26, 1978, 43 Fed. Reg. 27736–27773, and amended on January 28, 1981, 46 Fed. Reg. 9404–9460. The 1978 regulation differed in respects not relevant here.

[11] See 44 Fed. Reg. 32854, 32893–32894 (1979).

[12] NRDC acknowledges the limited availability of FDF variances. Brief for NRDC in Opposition 7–8. By 1977, only 50 of 4,000 major industrial dischargers covered by BPT limits had applied for FDF variances, and only two variances had been granted. *Id.*, at 12. By 1984, a total of four FDF variances had been granted to direct dischargers, and none had been granted to an indirect discharger. EPA estimates that in the entire country approximately 40 FDF variance requests filed by indirect dischargers are still pending. Brief for EPA 36, n. 28.

[13] In the Court of Appeals, NRDC also argued that EPA had neither statutory nor inherent authority to issue FDF variances from either BAT or pretreatment standards even when toxic pollutants were not involved. The court below did not reach this argument, *National Assn. of Metal Finishers* v. *EPA*, 719 F. 2d 624, 643–645 (1983), and we need not address it. For present purposes, we assume, without deciding, that EPA would have authority under the Act to issue the FDF variances in question here absent the provisions of § 301(l).

ers v. *EPA*, 719 F. 2d 624 (1983). We granted certiorari to resolve this conflict between the Courts of Appeals and to decide this important question of environmental law. 466 U. S. 957 (1984). We reverse.

II

Section 301(l) states that EPA may not "modify" any requirement of § 301 insofar as toxic materials are concerned. EPA insists that § 301(l) prohibits only those modifications expressly permitted by other provisions of § 301, namely, those that § 301(c) and § 301(g) would allow on economic or water-quality grounds. Section 301(l), it is urged, does not address the very different issue of FDF variances. This view of the agency charged with administering the statute is entitled to considerable deference; and to sustain it, we need not find that it is the only permissible construction that EPA might have adopted but only that EPA's understanding of this very "complex statute" is a sufficiently rational one to preclude a court from substituting its judgment for that of EPA. *Train* v. *NRDC*, 421 U. S. 60, 75, 87 (1975); see also *Chevron U. S. A. Inc.* v. *NRDC*, 467 U. S. 837 (1984). Of course, if Congress has clearly expressed an intent contrary to that of the Agency, our duty is to enforce the will of Congress. *Chevron, supra*, at 843, n. 9; *SEC* v. *Sloan*, 436 U. S. 103, 117–118 (1978).

A

NRDC insists that the language of § 301(l) is itself enough to require affirmance of the Court of Appeals, since on its face it forbids any modifications of the effluent limitations that EPA must promulgate for toxic pollutants. If the word "modify" in § 301(l) is read in its broadest sense, that is, to encompass any change or alteration in the standards, NRDC is correct. But it makes little sense to construe the section to forbid EPA to amend its own standards, even to correct an error or to impose stricter requirements. Furthermore, reading § 301(l) in this manner would forbid what § 307(b)(2) expressly directs: EPA is there required to "revise" its pretreatment standards "from time to time, as control technology, processes, operating methods, or other alternatives change." As NRDC does and must concede, Tr. of Oral Arg. 25–26, § 301(l) cannot be read to forbid every change in the toxic waste standards. The word "modify" thus has no plain meaning as used in § 301(l), and is the proper subject of construction by EPA and the courts. NRDC would construe it to forbid the kind of alteration involved in an FDF variance, while the Agency would confine the section to prohibiting the partial modifications that § 301(c) would otherwise permit. Since EPA asserts that the FDF variance is more like a revision permitted by § 307 than it is like a § 301(c) or (g) modification, and since, as will become evident, we think there is a reasonable basis for such a position, we conclude that the statutory language does not foreclose the Agency's view of the statute. We should defer to that view unless the legislative history or the purpose and structure of the statute clearly reveal a contrary intent on the part of Congress. NRDC submits that the legislative materials evince such a contrary intent. We disagree.

B

The legislative history of § 301(l) is best understood in light of its evolution. The 1972 amendments to the Act added § 301(c), which allowed EPA to waive BAT and pretreatment requirements on a case-by-case basis when economic circumstances justified such a waiver. Pub. L. 92–500, 86 Stat. 845. In 1977, the Senate proposed amending § 301(c) by prohibiting such waivers for toxic pollutants. See S. 1952, 92d Cong., 2d Sess., 30 (1977), Leg. Hist. 584,[14] and S. Rep.

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[14] Citations to the legislative history (Leg. Hist.) are to Senate Committee on Environment and Public Works, A Legislative History of the Clean Water Act of 1977, prepared by the Environmental Policy Division of the Congressional Research Service of the Library of Congress (Comm. Print 1978).

No. 95–370, p. 44 (1977), Leg. Hist. 677. At the same time, the Senate bill added what became § 301(g), which allowed waivers from BAT and pretreatment standards where such waivers would not impair water quality, but which, like § 301(c), prohibited waivers for toxic pollutants. S. 1952, at 28–29, Leg. Hist. 582–583.[15] The bill did not contain § 301(l). That section was proposed by the Conference Committee, which also deleted the toxic pollutant prohibition in § 301(c) and redrafted § 301(g) to prohibit water-quality waivers for conventional pollutants and thermal discharges as well as for toxic pollutants.[16] While the Conference Committee Report did not explain the reason for proposing § 301(l), Representative Roberts, the House floor manager, stated:

> "Due to the nature of toxic pollutants, those identified for regulation will not be subject to waivers from or modification of the requirements prescribed under this section, *specifically, neither section 301(c) waivers based on the economic capability of the discharger nor 301(g) waivers based on water quality considerations shall be available.*" Leg. Hist. 328–329 (emphasis added).

Another indication that Congress did not intend to forbid FDF waivers as well as §§ 301(c) and (g) modifications is its silence on the issue. Under NRDC's theory, the Conference Committee did not merely tinker with the wording of the Senate bill, but boldly moved to eliminate FDF variances. But if that was the Committee's intention, it is odd that the

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[15] The 1977 House bill to amend the Clean Water Act contained no comparable water quality waiver provision. H. R. 3199, 95th Cong., 1st Sess. (1977), Leg. Hist. 1167.

[16] In view of § 301(l), the ban on toxic waste waivers in § 301(g) was unnecessary. But there can be no doubt that § 301(l) forbade §§ 301(c) and (g) modifications for toxic materials, and the presence of a similar ban in § 301(g) lends little support for the notion that § 301(l) forbids FDF variances.

Committee did not communicate it to either House, for only a few months before we had construed the Act to permit the very FDF variance NRDC insists the Conference Committee was silently proposing to abolish. In *E. I. du Pont de Nemours & Co.* v. *Train*, 430 U. S. 112 (1977), we upheld EPA's class and category effluent limitations, relying on the availability of FDF waivers. *Id.*, at 128. Congress was undoubtedly aware of *Du Pont*,[17] and absent an expression of legislative will, we are reluctant to infer an intent to amend the Act so as to ignore the thrust of an important decision. *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U. S. 256, 266–267 (1979).[18]

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[17] A representative of NRDC testified before Congress that a "fundamental variance provision" was integral to the Act's system of "national, uniform, minimum effluent limitations." See Federal Water Pollution Control Act Amendments of 1977, Hearings before the Subcommittee on Environmental Pollution, Senate Committee on Environment and Public Works, 95th Cong., 1st Sess., Ser. No. 95–H25, pt. 9, p. 37 (1977).

There is other evidence that both this Court's decision in *Du Pont* and an earlier decision of the Fourth Circuit approving variances that took all statutory factors into account in *Appalachian Power Co.* v. *Train*, 545 F. 2d 1351 (1976), were brought to the attention of Congress during the debates on the 1977 amendments. Referring to a Library of Congress report, Representative Clausen, ranking minority member of the Subcommittee on Water Resources, stated during the House debate on the Conference Report to the final 1977 amendments that "full understanding of [the 1972 Clean Water Act amendments] can only be achieved by having an understanding of the case law interpreting the public law." 123 Cong. Rec. 38976 (1977), Leg. Hist. 374. The Library of Congress report Senator Clausen referred to specifically discussed both *Du Pont* and *Appalachian Power*. See Case Law Under the Federal Water Pollution Control Act Amendments of 1972 (Committee Print compiled for the House Committee on Public Works and Transportation by the Library of Congress), Ser. No. 95–35, pp. 20, 28 (1977).

[18] NRDC suggests that eliminating FDF variances would not overrule *Du Pont*, because the rationale for *Du Pont*'s holding applied only to BPT standards. Since BPT standards were due to be phased out, NRDC suggests, Congress had no reason to address *Du Pont*'s requirements of FDF waivers. Even if we were to accept NRDC's narrow reading of *Du Pont* —and we recognize that the *Du Pont* opinion arguably applies to BAT

NRDC argues that Congress' discussion of the Act's provisions supports its position. Several legislators' comments seemed to equate "modifications" with "waivers" or "variances."[19] Many of these statements, however, came in the specific context of discussing the "waiver" provisions of §§301(c) and (g), not the prohibition in §301(l). See, *e. g.*, 123 Cong. Rec. 39183–39184 (1977), Leg. Hist. 458, 461 (Sen. Muskie); 123 Cong. Rec. 38961 (1977), Leg. Hist. 331 (Rep. Roberts); S. Rep. No. 95–370, pp. 40–44, Leg. Hist. 673–677 (discussing water-quality based modifications). Simply because Members of Congress or Committees referred to modifications authorized by §§301(c) and (g) as "variance" provisions, does not mean that FDF variances are also modifications barred by §301(l).

After examining the wording and legislative history of the statute, we agree with EPA and CMA that the legislative history itself does not evince an unambiguous congressional intention to forbid all FDF waivers with respect to toxic materials. *Chevron*, 467 U. S., at 842–843, and n. 9.

C

Neither are we convinced that FDF variances threaten to frustrate the goals and operation of the statutory scheme set

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standards as well, 430 U. S., at 128; Brief for EPA 20–21—this argument ignores that the BPT regulations at issue in *Du Pont* contained a variance clause, and applied to pollutants that Congress declared toxic in the 1977 amendments. See, *e. g.*, 40 CFR §§415.62 and 415.172 (1976). Moreover, BPT standards remain in effect even today. For many industries—as a result of a consent decree authored in relevant part by NRDC—EPA is required to promulgate BPT level pretreatment standards as an interim measure pending development of potentially more technology-forcing BAT standards. See *NRDC* v. *Train*, 8 ERC, at 2128, 6 Env. L. Rep., at 20588. The electroplating pretreatment standards unsuccessfully challenged in the consolidated lawsuit below were one such regulation.

[19] See, *e. g.*, S. Rep. No. 95–370, p. 44 (1978), Leg. Hist. 677; Sen. Muskie, 123 Cong. Rec. 39183 (1977), Leg. Hist. 458; Rep. Roberts, 123 Cong. Rec. 38959–38961 (1977), Leg. Hist. 305.

up by Congress. The nature of FDF variances has been spelled out both by this Court and by the Agency itself. The regulation explains that its purpose is to remedy categories which were not accurately drawn because information was either not available to or not considered by the Administrator in setting the original categories and limitations. 40 CFR § 403.13(b) (1984). An FDF variance does not excuse compliance with a correct requirement, but instead represents an acknowledgment that not all relevant factors were taken sufficiently into account in framing that requirement originally, and that those relevant factors, properly considered, would have justified—indeed, required—the creation of a subcategory for the discharger in question. As we have recognized, the FDF variance is a laudable corrective mechanism, "an acknowledgment that the uniform . . . limitation was set without reference to the full range of current practices, to which the Administrator was to refer." *EPA* v. *National Crushed Stone Assn.*, 449 U. S. 64, 77–78 (1980). It is, essentially, not an exception to the standard-setting process, but rather a more fine-tuned application of it.[20]

We are not persuaded by NRDC's argument that granting FDF variances is inconsistent with the goal of uniform effluent limitations under the Act. Congress did intend uniformity among sources in the same category, demanding that "similar point sources with similar characteristics . . . meet similar effluent limitations," S. Rep. No. 92–1236, p. 126 (1972). EPA, however, was admonished to take into account the diversity within each industry by establishing appropriate subcategories. Leg. Hist. 455.

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[20] As EPA itself has explained:

"No discharger . . . may be excused from the Act's requirement to meet . . . a pretreatment standard through this variance clause. A discharger may instead receive an individualized definition of such a . . . standard where the nationally prescribed limit is shown to be more or less stringent than appropriate for the discharger under the Act." 44 Fed. Reg. 32854, 32893 (1979).

NRDC concedes that EPA could promulgate rules under § 307 of the Act[21] creating a subcategory for each source which is fundamentally different from the rest of the class under the factors the EPA must consider in drawing categories. The same result is produced by the issuance of an FDF variance for the same failure properly to subdivide a broad category.[22] Since the dispute is therefore reduced to an argument over the means used by EPA to define subcategories of indirect dischargers in order to achieve the goals of the Act, these are particularly persuasive cases for deference to the Agency's interpretation. Cf. *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U. S. 519, 543 (1978); *NLRB* v. *Bell Aerospace Co.*, 416 U. S. 267, 293 (1974).

NRDC argues, echoing the concern of the Court of Appeals below, that allowing FDF variances will render meaningless the § 301(l) prohibition against modifications on the basis of economic and water-quality factors. That argument ignores the clear difference between the purpose of FDF waivers and that of §§ 301(c) and (g) modifications, a difference we explained in *National Crushed Stone*. A discharger that satisfies the requirements of § 301(c) qualifies for a variance "simply because [it] could not afford a compliance cost that is not fundamentally different from those the Administrator has already considered" in creating a category and setting an effluent limitation. 449 U. S., at 78. A § 301(c) modification forces "a displacement of calculations already performed, not because those calculations were incomplete or had unexpected effects, but only because the costs happened to fall on one particular operator, rather than on another who might be economically better off." *Ibid.* FDF variances are specifically unavailable for the grounds that would justify the statutory modifications. 40 CFR §§ 403.13(e)(3) and (4) (1984). Both a source's inability to pay the foreseen costs, grounds for a § 301(c) modification, and the lack of a significant impact on water quality, grounds for a § 301(g) modification, are irrelevant under FDF variance procedures. *Ibid.;* see also *Crown Simpson Pulp Co.* v. *Costle*, 642 F. 2d 323 (CA9), cert. denied, 454 U. S. 1053 (1981).

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[21] 33 U. S. C. § 1317(b)(2).

[22] In the aftermath of the decision by the Court of Appeals below, EPA announced that it would entertain petitions for amended rulemaking by certain indirect dischargers previously eligible for FDF variances, explaining that in such cases "it may be appropriate to issue specific categorical standards for such facilities, treating them as a separate subcategory with more, or less, stringent standards as appropriate." 48 Fed. Reg. 52396 (1983).

EPA and CMA point out that the availability of FDF variances makes bearable the enormous burden faced by EPA in promulgating categories of sources and setting effluent limitations. Acting under stringent timetables,[23] EPA must collect and analyze large amounts of technical information concerning complex industrial categories.[24] Understand-

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[23] EPA was directed by § 304(g) of the Act, 33 U. S. C. § 1314(g), to publish promptly guidelines for the establishment of pretreatment standards and categories. As with the statutory deadlines for the setting of guidelines for direct dischargers, 33 U. S. C. § 1314(c), the time limits proved beyond the Agency's capability. As a result of lawsuits brought by NRDC, EPA has been placed under court-ordered deadlines for promulgating effluent limitations. See n. 4, *supra.*

[24] Typically, EPA must engage in an extensive data-collection effort, compiling information on the pollutants discharged by an industry, the process employed, the treatment technologies used by the industry or available for use, the treatability of the pollutants, and the economics of the industry. Often, the data indicate differences among segments of the industry, and EPA will establish subcategories to reflect those differences in the effluent limitations and standards that are promulgated.

The scope of the task of formulating national categorical standards is illustrated by the procedures followed by EPA in developing the BPT-level pretreatment standards for electroplating, which were unsuccessfully challenged in the consolidated lawsuit below. Of the 500 plants identified as potentially within the category of sources and sent questionnaires by EPA, approximately 200 provided some of the requested information. EPA conducted on-site visits of 82 of these in order to take samples of raw and treated waste water over several days, inspect treatment technology already in place, and collect other firsthand information. From these visits, EPA determined that 25 of the plants were representative in ably, EPA may not be apprised of and will fail to consider unique factors applicable to atypical plants during the categorical rulemaking process, and it is thus important that EPA's nationally binding categorical pretreatment standards for indirect dischargers be tempered with the flexibility that the FDF variance mechanism offers, a mechanism repugnant to neither the goals nor the operation of the Act.[25]

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treatment technology, character of raw waste water, and other factors. The data from these plants were then used to derive achievable effluent limitations, using a combination of statistical methodologies and engineering judgments. Brief for EPA 5, n. 3.

The FDF variances at issue here are available only for sources fundamentally different in a way which would have required EPA to place them initially in a separate category had their situation been considered. *EPA* v. *National Crushed Stone Assn.*, 449 U. S. 64, 77–78 (1980). Particularly in light of the limited availability of FDF variances, see n. 12, *supra*, and the requirement that such variances are permissible only when standards were originally set after considering a range of facilities which did not include those similar to the source covered by the requested variance, we harbor no fear that the variance scheme will lead to the breakdown of the categorical approach taken by Congress, so long as the EPA, as it is required, grants variances only for sources *fundamentally* different. 40 CFR § 403.13(b) (1984). This does not allow EPA to single out for different treatment the least or most efficient plants legitimately within a category that was drawn after considering the relevant range of factors.

[25] In the aftermath of *Du Pont*, Congress well may have chosen to allow the FDF variance procedure in order to ensure that the Act's pretreatment standards were not overturned. This Court has previously upheld regulations in part because of a provision for an exception or variance helped assure the parties of due process. See *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U. S. 742, 755 (1972); *FPC* v. *Texaco, Inc.*, 377 U. S. 33, 40–41 (1964); *United States* v. *Storer Broadcasting Co.*, 351 U. S. 192, 205 (1956). Other courts have found that the FDF variance procedure is critical to EPA's promulgation of treatment requirements of existing sources. See, *e. g.*, *Kennecott Copper Corp.* v. *EPA*, 612 F. 2d 1232, 1243–1244 (CA10 1979) (upholding regulations challenged for failure to take the statutory factors into account across the industry, since FDF variance procedures were available to apply those factors to fundamentally different plants); *Weyerhaeuser Co.* v. *Costle*, 191 U. S. App. D. C. 309, 338–339, 590 F. 2d 1011, 1040–1041 (1978) (upholding the promulgation of industrywide effluent limitations because the "crucial" variance mechanism provided the necessary flexibility).

III

Viewed in its entirety, neither the language nor the legislative history of the Act demonstrates a clear congressional intent to forbid EPA's sensible variance mechanism for tailoring the categories it promulgates. In the absence of a congressional directive to the contrary, we accept EPA's conclusion that § 301(l) does not prohibit FDF variances. That interpretation gives the term "modify" a consistent meaning in §§ 301(c), (g), and (l), and draws support from the legislative evolution of § 301(l) and from congressional silence on whether it intended to forbid FDF variances altogether and thus to obviate our decision in *Du Pont.*

Here we are not dealing with an agency's change of position with the advent of a different administration, but rather with EPA's consistent interpretation since the 1970's.[26] NRDC argues that its construction of the statute is better supported by policy considerations. But we do not sit to judge the relative wisdom of competing statutory interpretations. Here EPA's construction, fairly understood, is not inconsistent with the language, goals, or operation of the Act. Nor does the administration of EPA's regulation undermine the will of Congress.[27]

The judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE MARSHALL, with whom JUSTICE BLACKMUN and JUSTICE STEVENS join, and with whom JUSTICE O'CONNOR joins as to Parts I, II, and III, dissenting.

In these cases, the Environmental Protection Agency (EPA) maintains that it may issue, on a case-by-case basis, individualized variances from the national standards that limit the discharge of toxic water pollutants. EPA asserts this power in the face of a provision of the Clean Water Act that expressly withdraws from the agency the authority to "modify" the national standards for such pollutants. The Court today defers to EPA's interpretation of the Clean Water Act even though that interpretation is inconsistent with the clear intent of Congress, as evidenced by the statutory language, history, structure, and purpose. I had not read our cases to permit judicial deference to an agency's construction of a statute when that construction is inconsistent with the clear intent of Congress.

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[26] See n. 10, *supra.*

[27] See n. 12, *supra.*

I

The Clean Water Act requires the EPA Administrator to regulate two types of industrial facilities: (1) "direct" dischargers, *i. e.*, facilities that discharge waste water directly into navigable waters; and (2) "indirect" dischargers, *i. e.*, facilities that discharge waste water into publicly owned treatment works prior to discharge into navigable waters. For both types of requirements, EPA conducts rulemaking proceedings and promulgates nationwide, categorical limitations, that is, limitations applicable to categories of dischargers (*e. g.*, iron and steel plants).

The Act provides for the phased implementation of progressively more stringent requirements for direct dischargers. By July 1, 1977, existing direct dischargers were required to meet effluent limitations based on the "best practicable control technology currently available" (BPT). § 301(b)(1)(A), 86 Stat. 844, 33 U. S. C. § 1311(b)(1)(A). By July 1, 1984, such dischargers were obligated to meet limitations based on the "best available technology economically achievable" (BAT). § 301(b)(2)(A).[1]

Indirect dischargers are subject to "pretreatment" standards applicable to pollutants, including toxic pollutants, that are not susceptible to treatment by or would interfere with the operation of public treatment facilities. § 307(b). Pursuant to a consent decree, EPA has set limitations on existing indirect dischargers using the same two-phase scheme used for direct dischargers. See *ante*, at 119. Thus, pretreatment standards for existing indirect dischargers are set by reference to BPT and BAT levels.

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[1] New plants must meet new source performance standards (NSPS) based on the "best available demonstrated control technology." § 306.

In 1978, EPA issued pretreatment regulations that contained a variance provision for "fundamentally different factors" (FDF). See 43 Fed. Reg. 27757 (1978). An FDF variance is a case-by-case adjustment of the relevant nationwide standard. See 40 CFR § 403.13(b)(1) (1984). A discharger may obtain such a variance if the factors relating to its discharges are fundamentally different from those taken into account by EPA in setting the nationwide standard. § 403.13(c)(ii).

In a petition for review filed in the Court of Appeals for the Third Circuit, respondent NRDC challenged the FDF variance provision on two grounds. First, it argued that EPA lacked the inherent authority to issue such variances. Second, it argued that even if, in general, EPA had the authority to grant such variances, it could not do so in the case of toxic pollutants, because § 301(l), which was enacted as part of the 1977 amendments to the Act, bans all "modifications" from the toxic standards. The Third Circuit agreed with the latter argument, holding that § 301(l) prohibits FDF variances in the case of toxic pollutants. *National Assn. of Metal Finishers* v. *EPA*, 719 F. 2d 624, 644–646 (1983).[2] The court remanded the variance provision back to EPA without considering the question of EPA's inherent authority to grant such variances.[3]

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[2] Following the Third Circuit's decision, EPA revised its FDF regulation to comply with that decision. See 49 Fed. Reg. 5132 (1984); 40 CFR § 403.13(b)(2) (1984) ("A fundamentally different factors variance is not available for any toxic pollutant controlled in a categorical Pretreatment Standard"). The Agency explicitly stated that it was adopting this change directly as a result of the Third Circuit's decision. 49 Fed. Reg. 5132 (1984). No suggestion of mootness has been made by any of the parties, and EPA's position before this Court is consistent with the view that it desires to reinstate its prior regulation. Given all of these circumstances,

EPA advances—and the Court defers to—two independent statutory constructions in support of its position that § 301(l) does not ban FDF variances from the toxic standards. First, EPA argues that § 301(l) prohibits only modifications otherwise expressly allowed by two other statutory provisions—§§ 301(c) and (g)—and thus does not apply to FDF variances, which are nonstatutory. The plain meaning of § 301(l), the changes made prior to enactment to the bill containing this provision, and the clearly expressed congressional objectives in enacting § 301(l)—to deal vigorously and comprehensively with the extremely serious environmental problem caused by toxic pollutants—establish that this provision's scope was meant to be considerably broader than that attributed to it by EPA. As part of its effort to strengthen the control of toxic pollutants, Congress clearly intended to prohibit all exceptions to the nationwide, categorical standards.

Second, in a strained attempt to characterize the challenged variances in a way that would bring them outside the scope of the § 301(l) prohibition, EPA contends that the case-by-case FDF variance procedure provides a permissible alternative to the statutory mechanism for "revising" standards. The Court defers to this argument, and in so doing, it ignores the relevance of the central feature of the 1972 amendments to the Act—that Congress pointedly determined that water pollution control standards should take the form of general rules, to apply uniformly to categories of dischargers. As a result, the Court validates outcomes substantially less protective of the environment than those

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the revision of the regulation does not render this case moot. See *Maher* v. *Roe*, 432 U. S. 464, 468–469, n. 4 (1977).

[3] Under the Court's decision, the Third Circuit will now have to consider this question on remand.

mandated by Congress. The only view of FDF variances consistent with the scheme of the Clean Water Act is that they are individual exceptions that soften the hardship of general rules. As such, they are undoubtedly disallowed by § 301(l).

These cases are not about whether exceptions are useful adjuncts to regulatory schemes of general applicability. That is a policy choice on which courts should defer to Congress in the first instance, and to the administrative agency in the absence of a clear congressional mandate. Here, Congress has made the policy choice. It has weighed competing goals and determined that, whatever the general merits of exceptions schemes, they are simply inappropriate in the context of the control of toxic water pollution. As a result, an exceptions scheme such as the one challenged here simply cannot stand.

II

I first consider EPA's argument that § 301(l) proscribes only those modifications otherwise authorized by §§ 301(c) and (g). Under these provisions, EPA can "modify" the categorical standard if a discharger makes an adequate showing that such a standard is not within the discharger's economic capability and that a less stringent standard would nonetheless result in reasonable environmental progress, § 301(c),[4] or that a less stringent standard adequately protects water quality, § 301(g).[5] This limited view of § 301(l)'s scope is clearly inconsistent with congressional intent; the plain meaning of the statute and its legislative history show a clear congressional intent to ban all "modifications."

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[4] Under § 301(c):

"The Administrator may modify the requirements of subsection (b)(2)(A) . . . with respect to any point source for which a permit application is filed after July 1, 1977, upon a showing by the owner or operator of such point source satisfactory to the Administrator that such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants." 86 Stat. 845, 33 U. S. C. § 1311(c).

A

Section 301(l) provides:

> "The Administrator may not modify any requirement of this section as it applies to any specific pollutant which is on the toxic pollutant list under section 307(a)(1) of this Act." 91 Stat. 1590, 33 U. S. C. § 1311(*l*).

The statute does not define either "modify" or "modification." The phrase "may not modify any requirement," however, expressly proscribes all "modifications" of the standards for toxics. Nothing on the face of the statute suggests that Congress intended that qualifying language be read into this prohibition. On the contrary, the prohibition is unqualified.

EPA's argument that § 301(l) bans only those modifications otherwise authorized by §§ 301(c) and (g) is therefore incon-

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[5] Section 301(g) provides, in pertinent part:

"(1) The Administrator, with the concurrence of the State, shall modify the requirements of subsection (b)(2)(A) of this section with respect to the discharge of any pollutant (other than pollutants identified pursuant to section 304(a)(4) of this Act, toxic pollutants subject to section 307(a) of this Act, and the thermal component of discharges) from any point source upon a showing by the owner or operator of such a point source satisfactory to the administrator that—

. . . . .

"(C) such modification will not interfere with the attainment or maintenance of that water quality which shall assure protection of public water supplies, and the protection and propagation of a balanced population of shellfish, fish, and wildlife, and allow recreational activities, in and on the water and such modification will not result in the discharge of pollutants in quantities which may reasonably be anticipated to pose an unacceptable sistent with the plain meaning of the statute. By its terms, the statutory prohibition has universal scope, not the limited scope attributed to it by EPA.

B

Moreover, the legislative history demonstrates that Congress meant what it said, and it evidences a clear congressional intent to ban all "modifications." First, the legislative history firmly establishes that § 301(l) was enacted as part of a program to deal effectively and comprehensively with the problem of toxic pollutants, and that its prohibition was an integral part of this program. Under any canon of statutory construction, the congressional purposes in enacting a provision would be deemed relevant to the question of the scope of that provision, but the Court simply fails to discuss this issue.

In 1977, when it enacted the amendments to the Clean Water Act containing § 301(l), Congress regarded the problem of toxic pollution as a very serious one. For example, Senator Muskie, the major drafter and Senate manager of the bill containing § 301(l), remarked:

> "The seriousness of the toxics problem is just beginning to be understood. New cases are reported each day of unacceptable concentrations of materials in the aquatic environment, in fish and shellfish, and even in mother's milk. Empirical evidence has shown a statistical correlation between materials in New Orleans' drinking water and cancer mortality rates; Kepone has destroyed the James River, one of America's most productive, and most historic rivers; PCB's are pervasive and have ruined the fishing in the Hudson River and the Great Lakes; carbon tetrachloride is only the most recent material to contaminate the Ohio River; the

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risk to human health or the environment. . . ." 91 Stat. 1583, 33 U. S. C. § 1311(g).

> pesticide endrin has been found in Mississippi; perhaps worst of all, are the ones we do not know yet.
>
> "The more we find out, the more cause there is for concern. It is imperative that these materials be controlled." 123 Cong. Rec. 39181 (1977), Legislative History of the Clean Water Act of 1977, p. 454 (1978) (1977 Leg. Hist.).[6]

Similarly, Representative Roberts, the House manager of the bill, stated:

> "[Toxics] have not only polluted drinking water and destroyed both commercial and sport fishing, but in many major water bodies they also constitute a hazard to aquatic environment and public health that has yet to be fully recognized." 123 Cong. Rec. 38960 (1977), 1977 Leg. Hist. 327.

See also 1977 Leg. Hist. 334 (House Subcommittee memorandum).

The primary purpose of the 1977 amendments was to strengthen the regulation "of the increasingly evident toxic hazard." 123 Cong. Rec. 38960 (1977), 1977 Leg. Hist. 326 (Rep. Roberts). See also 123 Cong. Rec. 39219 (1977), 1977 Leg. Hist. 549 (Sen. Moynihan) ("There is no room for compromise here: toxics must be controlled"). The § 301(l) ban on "modifications" was an integral part of this effort to make the environment safe from toxics, and through it, Congress sought to prevent *any* weakening of the categorical standards for the control of toxic pollutants. It is clear that Congress knew full well what effects the rule might have on industry, and that it went forward nonetheless. For example, the legislators were aware that the prohibition against

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[6] Citations to the 1977 legislative history are to Senate Committee on Environment and Public Works, A Legislative History of the Clean Water Act of 1977, prepared by the Environmental Policy Division of the Congressional Research Service of the Library of Congress (Comm. Print 1978).

"modifications" of the standards for toxic pollutants could lead to "new regulations more restrictive than any previously contemplated." 123 Cong. Rec. 38993 (1977), 1977 Leg. Hist. 411 (Rep. Buchanan). Congress also realized that such regulations would cost industry "millions of dollars and result only in a little more clean-up of our waters." 123 Cong. Rec. 38952 (1977), 1977 Leg. Hist. 305 (Rep. Roberts). But Congress found that for toxics, unlike for other pollutants, *ibid.*, such high costs of pollution control were justified in view of the serious environmental dangers at stake. Cf. § 502(13) (defining "toxic" pollutants as pollutants that "cause death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions (including malfunctions in reproduction) or physical deformations").

It is readily apparent that a complete ban on modifications would most directly and completely accomplish the congressional goal. EPA offers no evidence in the legislative history to explain why this goal would be promoted by banning the statutory modifications of §§ 301(c) and (g), but would not more effectively be advanced by banning other modifications as well. It points to no evidence that Congress singled out the §§ 301(c) and (g) modifications as more pernicious from the standpoint of an effective toxic control program than modifications based on other factors. In fact, the statutory scheme suggests that the converse is true, as Congress specifically provided for statutory exemptions in these areas but not in other areas.

In the case of § 301(c), Congress was aware that certain firms would be driven to bankruptcy if they were required to comply strictly with the categorical standards. Congress determined that avoiding bankruptcies was an important social goal, and one that was not automatically outweighed by the goal of protecting the environment. Section 301(c) reflects the tension between these two goals: As long as a firm can make reasonable pollution control progress, it will not be driven to bankruptcy by its inability to meet higher pollution control standards.

Similarly, in the case of § 301(g) water-quality modifications, Congress decided not to force dischargers to meet standards higher than those that could be justified by legitimate environmental considerations. Thus, as long as a discharge did not interfere with the attainment of adequate water quality, a discharger would not be forced to expend additional resources in pollution control merely because a higher standard was "economically achievable." Cf. 123 Cong. Rec. 38960 (1977), 1977 Leg. Hist. 326 (Rep. Roberts).

If these two modifications are the only ones now prohibited, the result is wholly counterintuitive. EPA is in effect contending that economic and water-quality factors present the most compelling case for modification of the standard in the nontoxic context—as they are explicitly authorized by statute—but the least compelling case for modification in the toxic context—as they are the only modifications prohibited by § 301(l). As might be expected, EPA does not present any theory, much less a logical argument, or evidence in the legislative history, to support this extremely inconsistent result.

Moreover, if Congress had not intended to prohibit all modifications, it would almost certainly either have defined explicitly the scope of permissible modifications, or given the agency some guidance on how to go about doing so. Only in this way would Congress have had any assurance that modifications would be allowed only when they promoted interests of sufficient importance to outweigh Congress' foremost goal of protecting the environment against toxic pollution.

C

The changes made in conference to the 1977 amendments, which ultimately included § 301(l), provide further support for the proposition that Congress did not intend to limit § 301(l) in the way suggested by EPA. Of the three provisions that undergird EPA's theory—subsections (c), (g), and (l) of § 301—only subsection (c) was adopted before the 1977 amendments, as part of the 1972 amendments. See 33 U. S. C. § 1311(c). The 1977 Senate bill contained two provisions of interest here. First, the bill proposed amending subsection (c) to prohibit, in the case of toxic pollutants, variances based on economic factors. S. 1952, 95th Cong., 1st Sess., § 26(c) (1977), 1977 Leg. Hist. 584. Second, the Senate proposed what ultimately became subsection (g), which authorized modifications that did not interfere with water-quality goals. Like the proposed amendment to subsection (c), subsection (g) prohibited modifications in the case of toxic pollutants. The Senate bill did not contain subsection (l).

The Conference Committee changed the Senate bill in three relevant ways. First, it took out of subsection (c) the ban against modifications for toxics. Second, it reworded subsection (g) to prohibit water-quality modifications for conventional pollutants and for all thermal discharges, but it left unaffected the Senate bill's prohibition against modifications for toxic pollutants. Third, it added subsection (l), which creates a ban of general applicability on modifications for toxic pollutants.

In explaining these changes, petitioner CMA contends that during the Conference Committee deliberations, "it was decided that, rather than repeating the identical limiting clause [for toxic pollutants] at the end of § 301(c) and what had become § 301(g) of the Act, the limitation would be put into a separate § 301(l)." Brief for Petitioners in No. 83–1013, pp. 29–30. The debates of the Conference bill do not suggest that such a thing was "decided"; in fact, the reasons for the changes are not discussed at all. Moreover, if cleaning up the statutory language was in fact the objective of the changes, the Conference Committee was remarkably unsuccessful at doing so. Indeed, while the Committee took the prohibition against toxic modifications out of subsection (c), it left this prohibition undisturbed in subsection (g). Thus, the language of the Act simply belies CMA's explanation.

More importantly, the wording of § 301(l) strongly suggests that the purpose of the change was not to improve the style of the statute, but to expand the scope of the prohibition against "modifications." Indeed, there is an important difference in the wording of subsections (c), (g), and (l). Subsections (c) and (g), which authorize exceptions, apply by their terms only to modifications of "the requirements of subsection (b)(2)(A)."[7] If the Conference Committee was attempting merely to consolidate the bans on modifications of toxic standards, then it would similarly have limited the applicability of subsection (l) to subsection (b)(2)(A) requirements. Instead, subsection (l) applies to "any requirement of this section," which includes numerous standards in addition to those of subsection (b)(2)(A).[8]

In fact, it appears that EPA once agreed that the changes made in conference expanded the scope of the ban on "modifications." In the past, EPA construed § 301(l) to prohibit, in the case of toxics, not only subsection (c) and (g) modifications, but also modifications from secondary treatment standards otherwise authorized by subsection (h), Brief for EPA on Petition to Enforce Mandate and Petitions for Review 24 in *Appalachian Power Co.* v. *Train*, 620 F. 2d 1040 (CA4 1980). Cf. *FMC* v. *Seatrain Lines, Inc.*, 411 U. S. 726, 745

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[7] EPA argues that §§ 301(c) and (g) modifications are available only for BAT standards for direct dischargers. Brief for EPA 32, n. 23; Reply Brief for EPA 2-3, and n. 1. In contrast, NRDC argues that such modifications are available for pretreatment standards as well. See Brief for NRDC 29, and n. 41. That dispute is not central to these cases.

[8] The argument that the Conference Committee was unaware of the effect of its changes is particularly unpersuasive in this context because many of the conferees were familiar with the intricacies of the Clean Water Act. Indeed, 7 of the 26 conferees had been members of the Conference Committee at the time of the 1972 amendments to the Clean Water Act; another 7 conferees had served on the Committees that considered the 1972 amendments.

(1973) (administrative interpretation entitled to additional deference if "longstanding").

In summary, the Conference changes provide further support for a broad reading of § 301(l). See *FTC* v. *Raladam Co.*, 283 U. S. 643, 648 (1931). The Court, however, appears to draw the opposite conclusion. But in doing so, it completely ignores the difference in the scope of §§ 301(c) and (g) on the one hand, and § 301(l) on the other, and instead rests on an explanation of congressional activity that in fact explains almost nothing. See *ante*, at 126–127.

D

The Court and EPA both attach great importance to the congressional silence regarding FDF variances. EPA argues that *E. I. du Pont de Nemours & Co.* v. *Train*, 430 U. S. 112 (1977), held that FDF variances are "appropriate." According to EPA, if Congress had intended to reverse this result it would have made its intention clear. See Brief for EPA 28–29. This contention, which the Court finds persuasive, see *ante*, at 127–128, is based on a misunderstanding of what was at stake in *Du Pont*. That case did not authorize the issuance of variances in any context that is relevant here.

Du Pont involved a challenge to EPA's authority to issue, to direct dischargers, categorical effluent limitations for BPT and BAT. The Court had little difficulty in upholding such categorical limitations in the BAT context, as the statute provided that the limitations be set for "categories and classes" of dischargers, § 301(b)(1)(B). See *Du Pont*, *supra*, at 127. In contrast, the statute provided that BPT limitations be set for "point sources." § 301(b)(1)(A). Several chemical manufacturers argued that, given this language, individualized BPT limitations were necessary, and that regulation by categories and classes of dischargers was inappropriate. This Court rejected the industry's challenge, holding that BPT limitations could be set by industrywide regulation, so long as some allowance—such as FDF variances—was made for variations in individual plants. 430 U. S., at 128.

In support of its position that the Court broadly endorsed the issuance of FDF variances and that the congressional silence is noteworthy, EPA cites as dispositive one sentence in the opinion, which reads:

> "We conclude that the statute authorizes the 1977 limitations [BPT] as well as the 1983 limitations [BAT] to be set by regulation, so long as some allowance is made for variations in individual plants, as EPA has done by including a variance clause in its 1977 limitations." *Ibid.*

Only by taking this sentence out of context can one find support for the proposition that *Du Pont* requires FDF variances from BAT limitations, just as it does in the case of BPT limitations.[9] When read in context, the sentence cited by EPA clearly means that BPT standards, like BAT standards, can be set by regulation, but if EPA does so in the BPT context, it must allow for variances. Indeed, the Court had earlier concluded that "§ 301 unambiguously provides for the use of regulations to establish the [BAT] effluent limitations." *Du Pont*, *supra*, at 127. The Court did not qualify this conclusion in any way, but instead went on to discuss the BPT problem. The sentence that EPA refers to comes at the end of the discussion of BPT limitations, and is thus logically related to that discussion.

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[9] In fact, EPA does not appear to argue that *Du Pont requires* FDF variances in the case of BAT standards for direct dischargers. Instead, it seems to say merely that *Du Pont* sanctioned such variances. See Brief for Petitioners in No. 83-1373, pp. 20-21. To the extent that the sentence in question is relevant to the BAT context, it would seem to support a *requirement* for FDF variance, rather than the more modest claim made by EPA. Such a requirement, however, is inconsistent with the result reached in *Du Pont*. See n. 10, *infra*.

Furthermore, the Court upheld the regulations challenged in *Du Pont* even though they did not contain an FDF variance clause for BAT limitations. See 430 U. S., at 123, 127.[10] If the sentence in question has the meaning that EPA now ascribes to it, the Court would presumably have had to reverse on that point.

In summary, the portion of *Du Pont* on which EPA relies, has absolutely no bearing on the question of whether FDF variances are "appropriate"—to use the language employed by EPA, see n. 9, *supra*—when the statute calls for limitations for categories or classes of dischargers. See *EPA* v. *National Crushed Stone Assn.*, 449 U. S. 64, 72 (1980) ("*[Du Pont]* indicated that a variance provision was a necessary aspect of BPT limitations applicable by regulation to classes and categories of point sources"); *id.*, at 73, n. 12 ("*[Du Pont]* held that a uniform BPT limitation must contain a variance provision, if it is to be valid"). Both the facts and the rationale of this portion of *Du Pont* are of relevance only to cases in which EPA issues categorical standards in the face of a statutory scheme that calls for regulation of "point sources."

This distinction is of crucial significance because the standards for toxic pollutants, like all BAT and pretreatment standards, are to be set not for "point sources," but instead "for the applicable *category or class* of point sources." § 307(a)(2) (emphasis added) (toxics); see also § 301(b)(2)(A) (BAT); § 307(b)(3) (pretreatment). *Du Pont* did not consider whether such standards are necessary, or even appropriate, in this context.[11] We should scarcely attribute any significance to the legislative failure to discuss *Du Pont* because *Du Pont* considered a fundamentally different scheme of regulation. It may be that one day the Clean Water Act will be read to permit, for nontoxic pollutants, FDF variances from BAT and pretreatment standards; however, there is no reason why Congress should have said anything in 1977, when it enacted § 301(l), about a legal development that has not yet taken place, eight years later.

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[10] Compare 40 CFR §§ 415.12, 415.22, 415.32, 415.42, 415.52, 415.62, 415.92, 415.112, 415.122, 415.132, 415.142, 415.162, 415.172, 415.202 (1977) (providing for FDF variances from BPT standards), with 40 CFR §§ 415.13, 415.23, 415.33, 415.43, 415.53, 415.113, 415.123, 415.133, 415.143, 415.163, 415.203 (1977) (not providing for FDF variances from BAT standards).

[11] In fact, *Du Pont* dealt with one situation in which effluent standards were to be set for categories of dischargers: the new source standards of

There is, moreover, another reason for the legislative silence on FDF variances. The legislative history of the 1977 amendments shows that Congress believed—correctly, as it turns out—that the courts had not yet determined whether FDF variances were permissible in the BAT context. See S. Rep. No. 95–370 (1977), 1977 Leg. Hist. 674.[12] Only by misreading *Du Pont* and ignoring the relevant legislative history can the Court say that *Du Pont* "construed the Act to permit the very FDF variance NRDC insists the Conference Committee was silently proposing to abolish." *Ante*, at 128.[13]

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§ 306. There, the Court held not only that variances were not mandated, but that they would be impermissible. *Du Pont*, 430 U. S., at 138; see *infra*, at 160–161.

[12] Also, the FDF variance provisions were probably not noteworthy enough to attract congressional attention. At the time *Du Pont* was decided, EPA had provided for FDF variances only in the case of BPT standards for direct dischargers, and only two out of the thousands of sources covered by BPT standards had actually received such a variance. See Hearings on Possible Amendments to the Federal Water Pollution Control Act before the Subcommittee on Water Resources of the House Committee on Public Works and Transportation, 98th Cong., 1st Sess., 2741 (1983) (EPA Administrator Ruckelshaus).

[13] The Court also finds it noteworthy that, under the provisions of a consent decree, EPA is currently promulgating BPT-level standards that apply to toxics. The Court suggests that prohibiting FDF variances for those standards would be inconsistent with *Du Pont*. See *ante*, at 128–129, n. 18. What is relevant for the purposes of *Du Pont*, however, is not whether the standards in question are set by reference to BPT or BAT levels, but whether the statute calls for individualized or categorical standards. The pretreatment standards—for both toxics and nontoxics—are in

E

EPA also relies heavily on a statement by Representative Roberts:

> "Due to the nature of toxic pollutants, those identified for regulation will not be subject to waivers from or modification of the requirements prescribed under this section, *specifically*, neither section § 301(c) waivers based on the economic capability of the discharger nor 301(g) waivers based on water quality considerations shall be available." 123 Cong. Rec. 38960 (1977), 1977 Leg. Hist. 328–329 (emphasis added).

However, other statements in the debates fail similarly to restrict the scope of the provision. For example, Senator Muskie stated:

> "*Like toxic pollutants for which there are no waivers or modifications*, there are no potential waivers or modifications for conventional pollutants." 123 Cong. Rec. 39183 (1977), 1977 Leg. Hist. 458 (emphasis added).

See also 123 Cong. Rec. 38952 (1977), 1977 Leg. Hist. 305 ("Strict requirements are still in effect for damaging pollutants, such as toxics. However, for certain other pollutants, industry may get a waiver") (Rep. Roberts); 123 Cong. Rec. 38993 (1977), 1977 Leg. Hist. 411 (referring to "denial of *any* waiver" with respect to toxics) (Rep. Buchanan) (emphasis added).

Taken as a whole, the legislative history firmly supports the plain meaning of the statute, namely, that § 301(l) bans all

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the latter category, § 307(b), and the *Du Pont* variance requirement is therefore of no relevance to such standards.

Along similar lines, EPA points out that, prior to the 1977 amendments to the Act, it had granted an FDF variance for a toxic pollutant. At the time the variance was granted, however, that pollutant had not yet been designated as toxic. See Brief for EPA 12; Reply Brief for EPA 13.

"modifications," and not just those otherwise permitted by §§301(c) and (g). EPA's strongest argument in support of its position on this score is that, during the course of debates, one of the bill's managers used the word "specifically" instead of "for example." Under any accepted canon of construction, this choice of words is insufficient to overcome the other, more probative indications of congressional intent that emerge from an analysis of the legislative history. And, with the language and the legislative history pointing so definitely in the same direction, there can be no doubt that congressional intent was clear.

F

The determination that Congress clearly intended that §301(l) do more than just ban modifications otherwise permitted by §§301(c) and (g) compels the conclusion that EPA's construction to the contrary cannot stand. As this Court has repeatedly stated:

> "The interpretation put on the statute by the agency charged with administering it is entitled to deference, but the courts are the final authorities on issues of statutory construction. They must reject administrative constructions of the statute, whether reached by adjudication or by rulemaking, that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement." *FEC* v. *Democratic Senatorial Campaign Committee*, 454 U. S. 27, 31–32 (1981) (citations omitted).

See also *SEC* v. *Sloan*, 436 U. S. 103, 117–118 (1978); *FMC* v. *Seatrain Lines, Inc.*, 411 U. S., at 745–746; *Volkswagenwerk* v. *FMC*, 390 U. S. 261, 272 (1968); *NLRB* v. *Brown*, 380 U. S. 278, 291 (1965); *Social Security Board* v. *Nierotko*, 327 U. S. 358, 369 (1946); *Burnet* v. *Chicago Portrait Co.*, 285 U. S. 1, 16 (1932); *Webster* v. *Luther*, 163 U. S. 331, 342 (1896).

This case is thus unlike *Chevron U. S. A. Inc.* v. *NRDC*, 467 U. S. 837 (1984), on which the Court and EPA rely. In *Chevron*, the Court reviewed an EPA regulation that treated all pollution-emitting devices within the same industrial grouping as though they were encased within a single "bubble." This regulation was challenged on the ground that it was not based on a proper construction of the statutory term "stationary source." Analyzing the statutory language, the Court concluded that "parsing of general terms in the text of the statute" would not reveal the actual intent of Congress. *Id.*, at 861. Similarly, it found the legislative history "unilluminating." *Id.*, at 862. Given these two conclusions, the Court determined that deference to the Agency's reasonable interpretation was appropriate.

Chevron's deference requirement, however, was explicitly limited to cases in which congressional intent cannot be discerned through the use of the traditional techniques of statutory interpretation. Indeed, *Chevron* reaffirmed the principle that "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Id.*, at 843, n. 9.[14]

My disagreement with the Court does not center on its reading of *Chevron*, but instead on its analysis of the congressional purposes behind § 301(l). If I agreed with the Court's analysis of the statute and the legislative history, I too would conclude that *Chevron* commands deference to the administrative construction.

III

EPA's second construction of the statutory scheme is, on the surface, a more plausible one. EPA argues that FDF variances do not excuse compliance with the correct standards, but instead provide a means for setting more appropriate standards. It is clear that, pursuant to § 307(b)(2), EPA can "revise" the pretreatment standards, as long as it does so "following the procedure established . . . for the promulgation of such standards." The statute contemplates that the standards will be set and revised through notice-and-comment rulemaking and will be applicable to categories of sources. See §§ 307(b)(2), (3); see also Brief for EPA 9. EPA argues that such a "revision," which is clearly not proscribed by § 301(l), would be substantively indistinguishable from an FDF variance. Thus, according to the Agency, NRDC's concern stems not from the result achieved when an FDF variance is granted, but rather from the procedure employed in reaching that result. EPA relies on *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U. S. 519 (1978), for the proposition that an agency is free to choose between two procedures for reaching the same substantive ends. See Brief for EPA 11, 36.

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[14] The case explicitly acknowledged the continued validity of our long line of precedents holding that administrative constructions inconsistent with congressional intent cannot stand. 467 U. S., at 843, n. 9.

To support its argument, EPA points out that the factors that may justify an FDF variance are the same factors that may be taken into account in setting and revising the national pretreatment standards. Compare § 304(b)(2) (statutory standard) with 40 CFR § 403.13(d) (1984) (FDF variance provision). EPA also points out that, in considering whether an FDF variance will be granted, it cannot take into account factors that could not have justified a change in the national standards. See Brief for EPA 31; 40 CFR § 403.13(e)(1984). EPA acknowledges that the statute requires that the national pretreatment standards be established—and therefore revised—for "categories" of dischargers, see § 307(b)(3) (pretreatment standards); Brief for EPA 11; see also § 307(a)(2) (toxic standards), and not on a case-by-case basis. It argues, however, that nothing in the Clean Water Act precludes EPA from defining a subcategory that has only one discharger. See Brief for EPA 31.

The logic of EPA's position is superficially powerful. If EPA can, through rulemaking, define a subcategory that includes only one discharger, why should it not be able to do so through a variance procedure? In fact, if rulemaking and the variance procedure were alternative means to the same end, I might have no quarrel with EPA's position, which the Court has accepted. *Ante*, at 132–133. Indeed, "[a]bsent constitutional constraints or extremely compelling circumstances the administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." *Vermont Yankee, supra,* at 543 (citations omitted); see also *SEC* v. *Chenery Corp.*, 332 U. S. 194, 202–203 (1947).

However, the Agency's position does not withstand more than superficial analysis. An examination of the legislative history of the 1972 amendments to the Clean Water Act—the relevance of which both the Court and EPA ignore—reveals that Congress attached great *substantive* significance to the method used for establishing pollution control requirements.

The Conference Committee Report directed EPA to "make the determination of the economic impact of an effluent limitation on the basis of classes and categories of point sources, *as distinguished from a plant by plant determination.*" 1972 Leg. Hist. 304 (emphasis added).[15] Representative Dingell, one of the House conferees, described this principle as "very important" and stated that "a plant-by-plant determination of the economic impact of an effluent limitation is neither expected, nor desired, and, in fact, it should be avoided." 118 Cong. Rec. 33758 (1972), 1972 Leg. Hist. 254–255.

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[15] Citations to the 1972 legislative history are to Senate Committee on Public Works, A Legislative History of the Water Pollution Control Act Amendments of 1972, prepared by the Environmental Policy Division of the Congressional Research Service of the Library of Congress (Comm. Print 1973).

Similarly, Senator Muskie stated:

> "The Conferees intend that the factors described in section 304(b) be considered only within categories and classes of point sources *and that such factors not be considered at the time of the application of an effluent limitation to an individual point source within such a category or class.*" 118 Cong. Rec. 33697 (1972), 1972 Leg. Hist. 172 (emphasis added).

See also *Du Pont*, 430 U. S., at 130; *American Iron & Steel Institute* v. *EPA*, 526 F. 2d 1027, 1051 (CA3 1975) ("Congress clearly intended that the Administrator consider costs on a class or category basis, *rather than on a plant-by-plant basis*") (emphasis added). Moreover, in a letter urging the President to approve the 1972 amendments, William Ruckelshaus, EPA's Administrator, observed that the Act's standards should be set "for industrial categories, taking into account processes involved, age of equipment, and cost, considered on a *national, industry-wide basis.*" 118 Cong. Rec. 36775 (1972), 1972 Leg. Hist. 145 (emphasis added). It is difficult to imagine a legislative history that would make more clear that standards should not be set—and therefore should not be revised—on an individual basis.

The legislative history also makes clear why Congress found it so important that the standards be set for "categories" of dischargers, and not for individual dischargers. Congress intended to use the standards as a means to "force" the introduction of more effective pollution control technology. Thus, Congress directed EPA to establish BPT levels by reference to "the average of the best existing performance by plants of various sizes, ages, and unit processes within each industrial category." 118 Cong. Rec. 33696 (1972), 1972 Leg. Hist. 169 (Sen. Muskie). In establishing BAT levels, it directed EPA to look at "the best performer in an industrial category." 118 Cong. Rec. 33696 (1972), 1972 Leg. Hist. 170. By requiring that the standards be set by reference to either the "average of the best" or very "best" technology, the Act seeks to foster technological innovation. 118 Cong. Rec. 33696 (1972), 1972 Leg. Hist. 170. See generally La Pierre, Technology-Forcing and Federal Environmental Protection Statutes, 62 Iowa L. Rev. 771, 805–829 (1977); Note, Forcing-Technology: The Clean Air Act Experience, 88 Yale L. J. 1713 (1979).

Unlike the statutory revision mechanism of § 307(b), FDF variances are set not by reference to a category of dischargers, but instead by reference to a single discharger. In evaluating an application for a variance, EPA does not look at the group of dischargers in the same position as the applicant, but instead focuses solely on the characteristics of the applicant itself. Under the FDF program, there is no mechanism for EPA to ascertain whether there are any other dischargers in that position. Moreover, there is no mechanism for EPA to group together similarly situated dischargers. Quite to the contrary, a scheme in which the initial screening may be done by the individual States, at times determined by when the variance application is filed, is unlikely to lead to the identification of new subcategories. See 40 CFR § 403.13(k) (1984).

The FDF variance procedure leads to substantive results that are different in two fundamental ways from those attained through the rulemaking for categories of dischargers contemplated in § 307(b). First, it is less protective of the environment. If, for example, a discharger shows that its production processes—and, as a result, its costs of compliance—are significantly different from those taken into account in setting the categorical standards, that discharger would be eligible for an FDF variance, and EPA could set a new requirement based on the applicant's peculiar situation. See 40 CFR §§ 403.13(d)(5), (6) (1984); Tr. of Oral Arg. 14. It may turn out, however, that there are many other dischargers in the same situation, and that all of these dischargers use production processes that make pollution control possible at a much lower cost. If EPA took into account the production processes of these more efficient dischargers—as it presumably would have to do if it proceeded through rulemaking on a categorical scale—it would set a requirement far more stringent than that adopted as part of the FDF variance mechanism.

In the aggregate, if EPA defines a new pretreatment subcategory through rulemaking, the BAT-level pollution control requirement of each discharger would be determined by reference to the capability of the "best" performer. In contrast, if EPA provides individual variances to each plant in this group, only one discharger would have a requirement based on the capability of the best performer—the best performer itself. The others would necessarily be subject to less stringent standards.[16]

The second important difference is that FDF variances do not spur technological innovation to the same extent as § 307(b) revisions. In the preceding example, the discharger with environmentally unsound production processes would probably be compelled to purchase new technology if it were subjected to a pollution control requirement set by reference to the characteristics of the "best" discharger. Under the less stringent requirement adopted through the FDF variance procedure, it might not need to do so. The additional demand for new technology that results from the § 307(b) procedures creates incentives for technological innovation. In the long run, such innovation would lead to even better technology and to the possibility of further tightening of the pollution control requirements, as such technology became cheaper. In fact, Congress envisioned that this iterative procedure would ultimately lead to an elimination of harmful discharges. See 118 Cong. Rec. 33696 (1972), 1972 Leg. Hist. 170 (Sen. Muskie).

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[16] The same principle holds true—albeit to a lesser degree—for pretreatment standards set by reference to BPT levels.

It is true, of course, that even the statutory revision procedure might identify a subcategory with only one discharger. That procedure, however, will have established that this discharger is indeed uniquely situated. In contrast, an FDF variance sets an individual requirement even where there may be similarly situated dischargers.

In summary, whatever else FDF variances might do, they do not further the same congressional goals as the notice-and-comment rulemaking required for § 307(b) revisions.[17] *Vermont Yankee* is simply inapposite; Congress intended, for substantive reasons, that the pretreatment standards be set and revised through rulemaking for categories of dischargers.[18] The Court's conclusion to the contrary stems exclusively from its failure to consider why Congress chose to require categorical standards.

IV

The analysis of Parts II and III compels the conclusion that neither of the alternative arguments advanced to support EPA's construction of the statute can stand. That analysis also leads directly to the conclusion that § 301(l) in fact disallows FDF variances from the standards for toxic pollutants. Congress clearly intended that § 301(l) ban variances such as those at issue here, and the language and legislative history permit no other interpretation.

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[17] Also, EPA's argument on this score has no logical bounds. If FDF variances are a permissible alternative to the notice-and-comment procedure for "revisions" envisioned by § 307(b)(2), it must also be acceptable to set the standards in the first place through case-by-case determinations. See § 307(b)(2) (same procedures to be used in setting and revising standards). And, of course, there would be no reason for this theory to be confined solely to pretreatment standards. The argument that Congress was willing to tolerate case-by-case determinations of all of the water standards is so ludicrous as to hardly merit a reply. See *supra*, at 154–155.

[18] In fact, following the decision of the Court of Appeals for the Third Circuit in this case, EPA indicated that it would entertain petitions for amended rulemaking by certain indirect dischargers who were previously eligible for FDF variances. The aim of such rulemaking would be to identify a new subcategory of dischargers and to set an appropriate standard for that subcategory. 48 Fed. Reg. 52396 (1983). By proceeding in this manner—consistent with the requirements of § 307(b)(2)—EPA promotes the environmental protection and technology-forcing goals that Congress found so important.

A

Part II shows that the language of § 301(l), the purposes that led to the adoption of the provision, and the changes made by the Conference Committee, indicate a clear congressional intent to ban all "modifications" to the standards for toxics, not merely those otherwise authorized by §§ 301(c) and (g). The legislative history also establishes that Congress banned "modifications" because it wanted to ensure that the serious problem of toxic pollution not be exacerbated by the granting of exceptions to the general rulemaking standards. See Part II–B, *supra.*

It is true, of course, that in many cases exceptions serve the important purpose of softening the impact of rules of general applicability. They mediate between demands for comprehensive solutions on the one hand, and individualized application of law on the other. See generally Diver, Policymaking Paradigms in Administrative Law, 95 Harv. L. Rev. 393 (1981).

Exceptions, however, are not without costs. For example, they are inappropriate where small errors could lead to irreversible or catastrophic results.[19] In such cases, individual equity should give way to comprehensive rationality. See *id.*, at 431–432; Note, Regulatory Values and the Exceptions Process, 93 Yale L. J. 938, 955, and n. 85 (1984).

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[19] Environmental problems often present thresholds. For example, if the level of biochemical oxygen demand (BOD) in a river exceeds a certain level, fish life will become impossible. A slightly lower BOD level, however, would prevent this result. Thus, the cost of a relatively small mistake is very high. See B. Ackerman, S. Rose-Ackerman, J. Sawyer, & D. Henderson, The Uncertain Search for Environmental Quality 265–266 (1974). General rules, adopted after consideration of the comments of all interested parties, in a process fully open to public scrutiny, provide the best guarantee that such mistakes will not occur. See generally K. Davis, Discretionary Justice 65–66 (1969).

The decision of when exceptions are required, when they are permissible, and when they are prohibited is, in the first instance, one for Congress to make. It is an administrative decision only where Congress has left a gap for the agency to fill. See *Chevron*, 467 U. S., at 843–844. In this case, Congress determined that the flexibility resulting from exceptions would interfere with the furtherance of the more important goal of controlling toxic pollution. There is no question that courts should defer to this congressional judgment.

In fact, when Congress has attached great importance to certain environmental goals, we have disallowed exceptions even in the absence of an explicit statutory ban. For example, in *TVA* v. *Hill*, 437 U. S. 153 (1978), we reviewed a provision of the Endangered Species Act that required federal agencies "to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence" of an endangered species or "result in the destruction or modification of habitat of such species . . . ." 16 U. S. C. § 1536 (1976 ed.). Even though Congress had not expressly banned exceptions from the statutory requirements, the Court focused on the quoted language and found that it "admits of no exception." *Id.*, at 173. It further found that both the language and the legislative history "clearly" showed that Congress viewed the preservation of endangered species as a goal of great importance. *Id.*, at 187–188. In light of this statutory construction, the Court concluded that any exemption from the statute's requirements—other than exemptions specifically approved by Congress—would be inappropriate.[20]

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[20] The fact that Congress amended the Endangered Species Act following the Court's decision in *TVA* v. *Hill* is, of course, of no consequence to the analysis here. In these cases, however, Congress was asked to modify the

Similarly, in *Du Pont* itself, the Court disallowed FDF variances from the Clean Water Act's standards of performance for new sources, reasoning that such variances would be inconsistent with the environmental goals expressed in the statute and the legislative history. There, the Court stated that FDF variances "would be inappropriate in a standard that was intended to insure national uniformity and 'maximum feasible control of new sources.'" 430 U. S., at 138 (citation omitted). In this case, of course, Congress has not only indicated that the environmental goal at stake is extremely important, but it has also explicitly disallowed exceptions. Under such circumstances, it would be especially inappropriate to defer to the Agency's decision to create exceptions.

B

Part III establishes that FDF variances are not an alternative way of complying with the statutory command to set rules of general applicability. They do not implement the Clean Water Act's technology-based requirements; instead, like §§301(c) and (g) modifications, they are case-by-case departures from such requirements. In fact, in the past, EPA itself has referred to FDF variances as "exception[s] to [a] general rule of applicability." Brief for EPA 47 in *NRDC* v. *EPA*, 537 F. 2d 642 (CA2 1976).

FDF variances not only take the same form as §§301(c) and (g) modifications, but they also serve closely analogous functions. As I have discussed, the purpose of exceptions is to soften the harshness of general rules. See *supra*, at 159. A §301(c) modification, for example, relieves a firm of its obligation to meet an applicable rule when compliance with

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decision of the Court of Appeals for the Third Circuit by authorizing FDF variances from toxic standards, but declined to do so. See H. R. 3282, 98th Cong., 2d Sess. (1984); Hearings on Possible Amendments to the Federal Water Pollution Control Act before the Subcommittee on Water Resources of the House Committee on Public Works and Transportation, 98th Cong., 1st Sess., 2705-2706, 2724–2726, 2740–2741, 2747–2748 (1983).

that rule would place the firm in a serious hardship. See *EPA* v. *National Crushed Stone Assn.*, 449 U. S., at 78; S. Rep. No. 95–370, p. 41 (1977), 1977 Leg. Hist. 674 (Sen. Muskie); Brief for EPA 32–33. FDF variances also temper—albeit in a slightly different way—the effects of the nationwide, categorical standards. They relieve a firm of its obligation to comply with a rule that would impose on that firm a disproportionate share of the regulatory burden. See Tr. of Oral Arg. 14.[21] In fact, EPA itself has characterized FDF variances as "'safety valves' in regulatory schemes of general applicability." Brief for EPA 44 in *NRDC* v. *EPA*, 537 F. 2d 642 (CA2 1976); see also Hearings on Possible Amendments to the Federal Water Pollution Control Act before the Subcommittee on Water Resources of the House Committee on Public Works and Transportation, 98th Cong., 1st Sess., 2706, 2741 (1983) (EPA Administrator Ruckelshaus describing FDF variances as "safety valves"); *NRDC* v. *EPA*, 537 F. 2d, at 646 ("[T]he 'variance' clause was assertedly adopted as an administrative safety valve"). Thus, FDF variances are exceptions that provide the type of flexibility that § 301(l) sought to ban.[22]

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[21] Commentators have identified two categories of exceptions that are relevant in these cases: hardship exceptions and fairness exceptions. See, *e. g.*, Aman, Administrative Equity: An Analysis of Exceptions to Administrative Rules, 1982 Duke L. J. 277, 293–294; Shapiro, Administrative Discretion: The Next Stage, 92 Yale L. J. 1487, 1504 (1983); Schuck, When the Exception Becomes the Rule: Regulatory Equity and the Formulation of Energy Policy Through an Exceptions Process, 1984 Duke L. J. 163, 283–289. Under this classification, a § 301(c) modification is a hardship exception and an FDF variance is a fairness exception. A § 301(g) modification is a different type of fairness exception. It seeks to ensure that a firm not be forced to comply with the categorical standards when no environmental benefit would accrue from such compliance. See Aman, *supra*, at 311–312.

This classification of exceptions is reflected in several statutes. For example, the Department of Energy Organization Act, 42 U. S. C. § 7194(a); the Natural Gas Policy Act, 15 U. S. C. § 3412(c); and the Energy Policy and Conservation Act, 42 U. S. C. § 6393(a)(4), all provide for exceptions based on "special hardship, inequity, or unfair distribution of burdens." Of course, a "special hardship" exception is analogous to a § 301(c) modification; an "inequity or unfair distribution of burdens" exception is analogous to an FDF variance. Thus, the structure of these statutes supports the proposition that an FDF variance is an exception to a general rule. Cf. *Overstreet* v. *North Shore Corp.*, 318 U. S. 125, 128 (1943) (determining scope of phrase "engaged in interstate commerce" under the Fair Labor Standards Act by reference to use of that term in the Federal Employers' Liability Act).

The Court accepts EPA's present characterization that FDF variances are a hybrid: "more like" a revision permitted by § 307 than like a §§ 301(c) and (g) modification. *Ante,* at 126. But a requirement that, by definition, applies to only one discharger cannot be considered "more like" a rule of general applicability than like an exception to such a rule. Clearly, it *is* an exception.[23]

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[22] It is also relevant that, in the legislative history of § 301(l), the terms "modification," "variance," and "waiver" are often used interchangeably to describe exceptions to rules of general applicability. For example, during its Senate testimony, EPA used the term "variance" to describe statutory "modifications." Hearings on Federal Water Pollution Control Act Amendments of 1977 before the Subcommittee on Environmental Pollution, 95th Cong., 1st Sess. (1977); see 1977 Leg. Hist. 1102, 1124, 1419. Similarly, both Senator Muskie and Representative Roberts equated the terms "modification" and "waiver." 123 Cong. Rec. 39183 (1977), 1977 Leg. Hist. 458 (Sen. Muskie); 123 Cong. Rec. 38952 (1977), 1977 Leg. Hist. 305 (Rep. Roberts); see also S. Rep. No. 95–370, p. 44, 1977 Leg. Hist. 677.

Moreover, prior to the enactment of § 301(l), EPA repeatedly referred to the FDF variances as "modifications." See 43 Fed. Reg. 27738 (1978) ("provision for case-by-case modifications of the categorical pretreatment standards)"; Brief for EPA 40–41, 44–45, in *NRDC* v. *EPA*, 537 F. 2d 642 (CA2 1976) ("a procedure for modification of the limits"; "a limited modification of the regulations"; a "modification procedure").

In many other statutes, Congress has also used the terms "exceptions," "variances," "modifications," "adjustments," or "exemptions" interchangeably to refer to the identical concept: individual departures from general rules. See, *e. g.*, Federal Trade Traffic Safety Act, 15 U. S. C. §§ 1410, 1417 (exemptions); Natural Gas Policy Act, 15 U. S. C. § 3412(c) (adjustments); Federal Mine Safety and Health Act, 30 U. S. C. § 811(e) (modifications, exceptions); Safe Drinking Water Act, 42 U. S. C. § 300g–4 (variances); Clean Air Act, 42 U. S. C. § 7410(i) (modifications); Department of Energy Organization Act, 42 U. S. C. § 7194(a) (modifications, exceptions, exemptions); Federal Aviation Act, 49 U. S. C. §§ 1386(b)(1), 1421(c) (exemptions).

The Court's error is to overlook the distinction between general rules and exceptions. Instead, it focuses on the differences between the grounds for exceptions provided by §§ 301(c) and (g) on the one hand, and by the FDF provisions on the other. Thus, the Court makes its cuts along an entirely different—and irrelevant—axis. For EPA to prevail, the Court must show that Congress found that exceptions based on economic capability or water-quality factors were especially undesirable. If this were true, then exceptions based on other factors would be less undesirable, and it would make sense to decide the cases on the basis of the extent to which the factors taken into account in granting FDF variances differ from §§ 301(c) and (g) factors. The Court's position, however, is inconsistent with the clear purpose of § 301(l). As I have shown, there is absolutely no reason to believe that this provision was designed to ban §§ 301(c) and (g) modifications because there was something particularly pernicious about such exceptions. See *supra,* at 143. Rather, the congressional concern was that exceptions would weaken the standards for the control of toxic pollutants. This concern defines the relevant criterion: whether something is a general rule or an exception to such a rule. Sections 301(c) and (g) modifications are at one end of the axis not because they are based on economic or water-quality factors, but because they are exceptions to general rules. Section 307(b) revisions are at the other end of the axis not because they are based on factors taken into account in setting the standards, but because they are rules of general applicability. Of course, FDF variances, which are nothing but exceptions to general rules, are at the same end of the axis as §§ 301(c) and (g) modifications.

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[23] EPA argues that an FDF variance is equivalent to a subcategory containing only one discharger, and that the Act does not proscribe such subcategories. There is no merit to this argument. FDF requirements are set individually not because the applicant is in a unique position, but because the FDF procedures provide no mechanism for EPA to ascertain whether there are other dischargers in the same position as the applicant. See *supra,* at 156–158.

For the foregoing reasons, it is apparent that § 301(l) prohibits FDF variances from the pretreatment standards for toxic pollutants. I therefore dissent.

JUSTICE O'CONNOR, dissenting.

I join Parts I, II, and III of JUSTICE MARSHALL's dissent. They accurately demonstrate that the Court's interpretation of § 301(l) of the Clean Water Act, 33 U. S. C. § 1311(*l*), is inconsistent with the language of the statute and its legislative history. In my opinion, this alone is sufficient grounds for affirming the judgment of the Court of Appeals. I express no view as to Part IV of the dissent because I think it is not necessary to the disposition of these cases.

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE ET AL. *v.* HAMPTON COUNTY ELECTION COMMISSION ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

No. 83–1015. Argued November 28, 1984—Decided February 27, 1985

Section 5 of the Voting Rights Act provides that covered States or political subdivisions may not implement any election practices different from those in force on November 1, 1964, without first obtaining approval from the United States District Court for the District of Columbia or, alternatively, from the Attorney General. As of November 1, 1964, the public schools of Hampton County, South Carolina, a covered jurisdiction, were governed by an appointed County Board of Education and an elected Superintendent of Education. The county consists of two School Districts, one where the vast majority of white students live, and the other predominantly black. Each District was governed by a Board of Trustees, who were appointed by the County Board of Education. In 1982, the South Carolina General Assembly enacted Act No. 547, providing that the members of the County Board of Education were to be elected at large rather than appointed. The first election was to be held simultaneously with the general election in November 1982, and prospective candidates were required to file with appellee Election Commission at least 45 days before the election. Act No. 547 was submitted to the Attorney General for approval under § 5 of the Voting Rights Act, and he informed the State that he had no objection to the change. But in the meantime, before the Attorney General had approved Act No. 547, Act No. 549 was enacted to abolish the County Board of Education and Superintendent and to devolve their duties upon the District Boards of Trustees, which were to be elected separately. The first trustee election was also scheduled to be held with the November general election, and candidates were required to file between August 16 and 31. Act No. 549 was also submitted to the Attorney General for clearance under § 5, and he initially interposed an objection. Nevertheless, the Election Commission, contemplating a reconsideration, continued to accept candidate filings under Act No. 549, and at the same time began accepting filings under Act No. 547. Since the Attorney General had not yet responded to the State's request for reconsideration of his objection to Act No. 549 by the date of the November general election, elections for the County Board of Education were held on that date pursuant to Act No. 547, and no elections were held pursuant to Act No. 549. Thereafter the Attorney General withdrew his objection to Act No. 549, thereby rendering null and void Act No. 547 and the November elections held pursuant thereto. The South Carolina Attorney General then informed the Election Commission that Act No. 549 was in effect and that an election pursuant thereto should be held. Accordingly, the Commission set March 15, 1983, as election day. Appellants, two civil rights organizations and several residents of Hampton County, filed suit in Federal District Court, seeking to enjoin the election as illegal under § 5 of the Voting Rights Act. The court denied relief, holding that no violation of § 5 had occurred, since, although Act No. 549 itself was a change under the Voting Rights Act, the scheduling of the election and the filing period were simply "ministerial acts necessary to accomplish the statute's purpose and thus did not require preclearance." The court further held that even if these acts were "changes," they had now been precleared along with the remaining provisions of Act No. 549.

Held: The use of an August filing period in conjunction with a March election, and the setting of the March election itself, were changes that should have been submitted to the Attorney General under § 5 of the Voting Rights Act. Pp. 174–183.

(a) By opening the filing period for School District Trustees before preclearance and scheduling the election for a date four months later than that approved by the Attorney General, the county effectively altered the filing deadline from a date approximately two months before the election to one that was almost six months before the election. These changes cannot fairly be characterized as "ministerial" in light of the sweeping objectives of the Voting Rights Act. They possibly prevented relative latecomers from entering the race, and in addition a March election is likely to draw significantly fewer voters than an election held simultaneously with a November general election. The inquiry here is limited to whether the challenged changes have the *potential* for discrimination. These changes did have such a potential and therefore should have been precleared under § 5. Pp. 174–181.

(b) The changes cannot be said to have been implicitly approved when the Attorney General withdrew his objection to Act No. 549. *Berry* v. *Doles*, 438 U. S. 190, distinguished. Nor can the Attorney General be said to have validated the changes, retroactively or otherwise, because they were never before him. Pp. 181–182.

Reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, MARSHALL, BLACKMUN, STEVENS, and O'CONNOR, JJ., joined. POWELL and REHNQUIST, JJ., concurred in the judgment.

Armand Derfner argued the cause for appellants. With him on the briefs were *John R. Harper II*, *Thomas I. Atkins*, *J. LeVonne Chambers*, *Lani Guinier*, and *Eric Schnapper.*

David A. Strauss argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Lee*, *Assistant Attorney General Reynolds*, *Deputy Solicitor General Wallace*, *Deputy Assistant Attorney General Turner*, *Barbara E. Etkind*, and *Jessica Dunsay Silver.*

Treva G. Ashworth, Senior Assistant Attorney General of South Carolina, argued the cause for appellees and filed a brief for appellees Hampton County Election Commission et al. With her on the brief were *T. Travis Medlock*, Attorney General, and *J. Emory Smith, Jr.*, Assistant Attorney General. *Bruce E. Davis* and *Karen LeCraft Henderson* filed a brief for appellees Hampton County School District No. 1 et al.

JUSTICE WHITE delivered the opinion of the Court.

This appeal challenges a three-judge District Court's construction and application of § 5 of the Voting Rights Act, 79 Stat. 437, as amended, 42 U. S. C. § 1973c. That section provides that certain jurisdictions, including the one in which this case arose, may not implement any election practices different from those in force on November 1, 1964, without first obtaining approval from the United States District Court for the District of Columbia or, alternatively, from the Attorney General.[1] The statute further provides that once a proposed

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[1] Section 5, as set forth in 42 U. S. C. § 1973c, provides in pertinent part:

"Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, . . . such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualificachange has been submitted to the Attorney General, he has 60 days in which to object. If an objection is interposed, the submitting authority may request reconsideration. 28 CFR § 51.44 (1984). Such a request triggers another 60-day period for the Attorney General to decide whether to continue or withdraw his objection. § 51.47. The District Court held that § 5 did not require the changes in election practices involved here to be cleared by the Attorney General prior to their implementation. We noted probable jurisdiction, 467 U. S. 1250 (1984), and now reverse that judgment.

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tion . . . does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification . . . : *Provided,* That such qualification . . . may be enforced without such proceedings if the qualification . . . has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification . . . . In the event that the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court."

The option of obtaining preclearance from the Attorney General, rather than from the District Court for the District of Columbia, was added to the original legislation "'to provide a speedy alternative method of compliance to covered States.'" *McCain* v. *Lybrand,* 465 U. S. 236, 246 (1984) (quoting *Morris* v. *Gressette,* 432 U. S. 491, 503 (1977)).

I

As of November 1, 1964, the Hampton County, South Carolina, public schools were governed by appointed officials and an elected Superintendent of Education. The county comprises two school districts, School District No. 1, where the vast majority of white students live, and School District No. 2, which is predominantly black.[2] Each District was governed by a separate six-member Board of Trustees. These trustees were appointed by a six-member County Board of Education, which in turn was appointed by the county legislative delegation.

On February 18, 1982, apparently in an attempt to facilitate consolidation of these two School Districts,[3] the South Carolina General Assembly enacted Act No. 547. This statute provided that, beginning in 1983, the six members of the County Board of Education were to be elected at large rather than appointed. The first election for the new Board was to be held simultaneously with the general election in November 1982, and prospective candidates were required to file with the Election Commission at least 45 days before the election.[4] Pursuant to § 5 of the Voting Rights Act, the State submitted Act No. 547 for the approval of the Attorney General, who received it on February 27.[5] On April 28, the Attorney General informed the State that he had no objection to the change in question.[6]

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[2] According to appellants' complaint filed in the District Court, the county as a whole is 47% white and 53% black. School District No. 1 contains 91% of the white student population, and its schools are 46% white. School District No. 2 is 92% black. App. 8a–10a.

[3] According to the court below, it was thought that an elected board, as opposed to an appointed one, would "be responsive to consolidating School Districts One and Two." App. to Juris. Statement 3a (order of United States District Court for the District of South Carolina, Sept. 9, 1983).

[4] See *id.*, at 17a.

[5] See App. 52a (letter of Gerald W. Jones to C. Havird Jones, Jr.).

[6] *Ibid.*

On April 9, however, before the Attorney General had approved Act No. 547, the Governor of South Carolina signed Act No. 549, which was designed to supersede Act No. 547. Act No. 549 abolished the County Board of Education and the County Superintendent, devolving their duties upon the District Boards of Trustees, which were to be elected separately by each District. Like Act No. 547, Act No. 549 scheduled the first trustee election to coincide with the November 1982 general election. Candidates were required to file between August 16 and August 31. Implementation of the Act was made contingent upon approval in a referendum to be held in May 1982.[7]

The State did not submit Act No. 549 to the Attorney General for clearance until June 16, 1982, 22 days after it was approved in the referendum and 68 days after it had been enacted.[8] As of August 16—the opening date of the filing period under Act No. 549—no response had yet been received from the Attorney General. Nevertheless, the County Election Commission began accepting filings for elections to be held under Act No. 549. On August 23, the Attorney General interposed an objection. He informed the State that it had not sustained its burden of showing that the proposal to eliminate the County Board of Education did not have a discriminatory purpose or effect. The Attorney General noted that "the county board has been particularly responsive to the interests and needs of the black community in Hampton County and consistently has appointed bi-racial representation on the local boards of trustees for both School District 1 and School District 2."[9]

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[7] App. to Juris. Statement 19a–21a. In their complaint in the court below and in their brief in this Court, appellants alleged that Act No. 549 was enacted in response to pressure from white citizens of Hampton County who feared that Act No. 547 might lead to consolidation of the two School Districts. The complaint alleged that white residents of School District No. 1 circulated a petition calling for the abolition of the County Board of Education and the County Superintendent, thus severing the connection between School District No. 1 and School District No. 2. Brief for Appellants 5.

[8] App. to Juris. Statement 4a (order of United States District Court for the District of South Carolina, Sept. 9, 1983).

Because the State was contemplating requesting the Attorney General to reconsider this objection, the County Election Commission continued to accept filings under Act No. 549 through the end of the designated filing period, August 31. On that date, the State officially requested reconsideration.[10] At the same time, the Election Commission began accepting filings under Act No. 547, in case the Attorney General refused to withdraw his objection to Act No. 549. On November 2, the date of the general election, the Attorney General had not yet responded to the request for reconsideration, and elections for County Board members were held pursuant to Act No. 547.[11] No elections were held pursuant to Act No. 549.

On November 19, the Attorney General withdrew his objection to Act No. 549. The objection had been based primarily on the possibility that the County Board, which the Act would abolish, might have consolidated the two School Districts, but, upon reappraising South Carolina law, the Attorney General concluded that the Board lacked authority to approve such a consolidation. Therefore, its elimination would not have a potentially discriminatory impact.[12]

The effect of the Attorney General's clearance of Act No. 549 was to render Act No. 547—and the November elections held pursuant to it—null and void. In response to a request for advice, the South Carolina Attorney General informed the County Election Commission in January that

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[9] *Id.*, at 59a.

[10] *Id.*, at 63a–64a (letter of C. Havird Jones, Jr., to William Bradford Reynolds).

[11] Of the six Board members elected in the November election, three were black and three were white. Brief for Appellants 9.

[12] App. to Juris. Statement 65a–66a (letter of William Bradford Reynolds to C. Havird Jones, Jr.).

Act No. 549 was now in effect and that an election for school district trustees should be held "as soon as possible." The State Attorney General further opined that there was no reason to reopen the filing period, "as only the date of the election has changed."[13] Accordingly, the Commission set March 15, 1983, as election day.

On March 11, appellants, two civil rights organizations and several residents of Hampton County, filed suit in the United States District Court for the District of South Carolina seeking to enjoin the election as illegal under § 5 of the Voting Rights Act. The defendants were the County Election Commission, the two School Districts, and various county officials. The complaint identified a number of alleged "changes" in election procedure, including the scheduling of an election at a time other than that specified in the statute, and the use of the August filing period for the March election.[14] A preliminary injunction was denied, and the election took place as scheduled.[15] Subsequently, a three-judge panel denied a permanent injunction and declaratory relief, holding that no violation of § 5 of the Voting Rights Act had occurred.[16] The court reasoned that, although Act No. 549

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[13] *Id.*, at 67a–69a (letter of Treva Ashworth to Randolph Murdaugh III).

[14] The complaint also alleged two other "changes." One of these was the failure to certify the results of the May referendum to the State Code Commissioner as required by state law. Appellants have not raised this claim in this Court. Appellants also argued in the District Court, and in their brief in this Court, that Act No. 549 had effectively shortened the term of the County Superintendent of Education. Appellants stated at oral argument that they no longer wished to pursue this claim. In addition, the complaint alleged that the abolition of the Board of Education violated § 2 of the Votings Rights Act and the Fourteenth and Fifteenth Amendments. App. 22a–23a. These claims are the subject of continuing litigation in the District Court. Brief for Appellants 13, n. 3.

[15] *Id.*, at 13–14. Black candidates were elected to all five seats on the District No. 2 Board on March 15. Four whites and one black won seats on the District No. 1 Board. App. to Juris. Statement 7a, n. 2.

[16] Section 5 of the Voting Rights Act provides that "[a]ny action under this section shall be heard and determined by a court of three judges in

itself was a "change" under the Act, the scheduling of the election and the filing period were simply "ministerial acts necessary to accomplish the statute's purpose . . . , and thus did not require preclearance." App. to Juris. Statement 9a. In the alternative, the court held that even if these acts did constitute "changes," they had now been "precleared along with the remaining provisions of Act No. 549." *Ibid.* That this "preclearance" did not occur until after the filing period had been held was not considered dispositive. The court interpreted *Berry* v. *Doles*, 438 U. S. 190 (1978), to stand for the proposition that after-the-fact federal approval under § 5 might retroactively validate a change in voting procedures.[17]

II

Appellants contend that the opening of the August filing period before preclearance, and the scheduling of an election in March after the Attorney General had approved only a November election date, are changes that come within the scope of § 5. Appellees, echoing the rationale of the District Court, maintain that opening the filing period as required by Act No. 549—albeit before the Act had been approved—was merely a preliminary step in its implementation. If the Attorney General had ultimately disapproved Act No. 549, the county would not have held an election under it, and the filing period would have become a nullity. Because Act No. 549 was in fact cleared, the filing period it specified was necessarily cleared as well. The alteration of the date of the election, according to appellees, was merely an "unfreezing" of a process that had been temporarily suspended by the operation of the Voting Rights Act. Although appellees concede that a legislatively enacted change in the date of an election is covered by the Act,[18] they distinguish the change at issue

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accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court." 42 U. S. C. § 1973c.

[17] App. to Juris. Statement 8a–11a.

[18] Brief for Appellee School Districts 27.

here because it was required only by the Attorney General's failure to approve Act No. 549 before the scheduled election date, and because it was undertaken only to effect the initial implementation of the statute.

We need not decide whether a jurisdiction covered by § 5 may ever open a filing period under a statute that has not yet been precleared.[19] In this case, Hampton County not only opened the filing period for School District trustees before preclearance, but it also scheduled the election for a date four months later than that approved by the Attorney General. Thus the county effectively altered the filing deadline from a date approximately two months before the election to one that was almost six months before the election.

These changes cannot fairly be characterized as "ministerial" in light of the sweeping objectives of the Act. The Voting Rights Act was aimed at "the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race." *Allen* v.

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[19] We note, however, that a prime concern of Congress when it extended the Voting Rights Act in 1982 was the prevalence of changes that were implemented without preclearance and, in some cases, were not submitted to the Attorney General until years later. See S. Rep. No. 97–417, pp. 12, 14, n. 43 (1982); H. R. Rep. No. 97–227, p. 13 (1981). The Senate Report stated:

"Timely submission of proposed changes before their implementation is the crucial threshold element of compliance with the law. The Supreme Court has recognized that enforcement of the Act depends upon voluntary and timely submission of changes subject to preclearance.

"The extent of non-submission documented in both the House hearings and those of this Committee remains surprising and deeply disturbing. There are numerous instances in which jurisdictions failed to submit changes before implementing them and submitted them only, if at all, many years after, when sued or threatened with suit.

"Put simply, such jurisdictions have flouted the law and hindered the protection of minority rights in voting." S. Rep. No. 97–417, *supra*, at 47–48.

Generally, statutes that are subject to § 5 are ineffective as laws until they have been cleared by federal authorities. *Connor* v. *Waller*, 421 U. S. 656 (1975) *(per curiam)*.

State Board of Elections, 393 U. S. 544, 565 (1969). Our precedents recognize that to effectuate the congressional purpose, § 5 is to be given broad scope. *Id.*, at 567; see also *Dougherty County Board of Education* v. *White*, 439 U. S. 32, 38 (1978). Also, far from exempting alterations that might be perceived as minor, Congress failed to adopt such a suggestion when it was proposed in debates on the original Act.[20]

Developments since the passage of the Act provide no basis for concluding that our cases had misinterpreted the intent of Congress. On the contrary, the legislative history of the most recent extension of the Voting Rights Act in 1982 reveals that the congressional commitment to its continued enforcement is firm. The Senate Committee found "virtual unanimity among those who [had] studied the record," S. Rep. No. 97–417, p. 9 (1982), that § 5 should be extended. And, as it had in previous extensions of the Act, Congress specifically endorsed a broad construction of the provision.[21]

Although this Court has never addressed itself to alterations in voting procedures that exactly parallel those at issue in this case, we have twice held that the rescheduling of a candidate qualifying period is a "change" that comes within the scope of § 5. *Hadnott* v. *Amos*, 394 U. S. 358, 365–366 (1969); *Allen* v. *State Board of Elections, supra*, at 551, 570.[22] Of course, there was no alteration in the filing period itself in this case; it was held between August 16 and August 31, exactly as Act No. 549 required. But a filing period cannot be considered in isolation from the election of which it forms a part. As we have recognized in an analogous context, issues that provoke responses from the electorate and from potential candidates are most likely to arise shortly before election time.[23] Under appellees' approach, a filing period held years before an election would serve as well as one held on election eve. But clearly, the former has a much greater potential for hindering voter participation than the latter. Furthermore, the August filing period was held at a time when the Attorney General still had an outstanding objection to Act No. 549. Potential candidates who considered the opening of the filing period illegal in these circumstances may have deliberately stayed away.[24]

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[20] In *Allen*, the Court noted that the Attorney General stated in hearings in the House that two or three types of changes, such as changing from paper ballots to voting machines, could be specifically excluded from § 5 without undermining its purpose. We found it significant that "Congress chose not to include even these minor exceptions in § 5, thus indicating an intention that all changes, no matter how small, be subjected to § 5 scrutiny." 393 U. S., at 568.

[21] S. Rep. No. 97–417, *supra*, at 6–7, and n. 8; see also H. R. Rep. No. 97–227, *supra*, at 34–35 (rejecting proposal to limit § 5 to cover only those changes that had produced the most objections; "'[t]he discriminatory potential in seemingly innocent or insignificant changes can only be determined after the specific facts of the change are analyzed in context'") (quoting testimony of Drew Days, former U. S. Assistant Attorney General).

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[22] See also *Dougherty County Board of Education* v. *White*, 439 U. S. 32, 43 (1978), where we held that a Board of Education rule requiring employees to take unpaid leaves of absence while campaigning for elective political office was a barrier to candidacy "as formidable as the filing date changes at issue in" *Hadnott* and *Allen*. In other contexts, we have interpreted § 5 broadly to require preclearance of changes in residence requirements for candidates, *City of Rome* v. *United States*, 446 U. S. 156, 160–161 (1980); alterations of municipal boundaries, *Richmond* v. *United States*, 422 U. S. 358 (1975); reapportionment and redistricting plans, *Georgia* v. *United States*, 411 U. S. 526 (1973); and the location of polling places, *Perkins* v. *Matthews*, 400 U. S. 379 (1971).

[23] See *Steelworkers* v. *Usery*, 429 U. S. 305 (1977) (recognizing, in union democracy context, potential adverse impact of requiring candidates to qualify long before election).

[24] Only one black candidate filed for election as a trustee of District No. 1 during the August filing period. He was ultimately elected to the post, along with four white candidates. Brief for Appellants 27, and n. 12. That other potential candidates were prevented from filing is not mere speculation. Appellants alleged in their complaint that three black citizens of Hampton County, including appellant Benjamin Brooks, attempted

Appellees do not seriously dispute that a change in the date of an election, if effected by statute, requires approval by the Attorney General under § 5.[25] Rather, they argue that because the rescheduling in this case was merely an administrative effort to comply with a statute that had already received clearance, it was not a change of such magnitude as to trigger the requirements of § 5. But plainly, the form of a change in voting procedures cannot determine whether it is within the scope of § 5. That section reaches informal as well as formal changes, such as a bulletin issued by a state board of elections. *Allen*, *supra*.[26] If it were otherwise, States could evade the requirements of § 5 merely by implementing changes in an informal manner. Neither is it determinative that an alteration in scheduling is unlikely to be repeated, as it would be if it were embodied in a statute or rule. The Voting Rights Act reaches changes that affect even a single election.[27] As we have noted, the change in the election date in this instance extended the gap between the filing period and the election, possibly preventing relative latecomers from entering the race. In addition, an election in March is likely to draw significantly fewer voters than an election held simultaneously with a general election in November.[28]

Any doubt that these changes are covered by § 5 is resolved by the construction placed upon the Act by the Attor-

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to have their names placed on the ballot for trustee positions in February, but were told that the filing period had ended the previous August. App. 16a–17a.

[25] See *supra*, at 174.

[26] See also *Dougherty County*, *supra* (rule promulgated by County Board of Education).

[27] See H. R. Rep. 97–227, at 35 (rejecting proposal that § 5 should be limited to changes that produce most objections; "[w]hile some changes may adversely affect a greater number of people, others may have precisely the type of discriminatory impact which Congress sought to prevent, even though the numbers involved are smaller").

[28] Appellants state that over 6,000 Hampton County voters participated in the November 1982 general election, whereas less than half that number voted in the March 1983 special election. Brief for Appellants 23–24.

ney General, which is entitled to considerable deference.[29] Under Department of Justice regulations:

> "Any change affecting voting, even though it appears to be minor or indirect, even though it ostensibly expands voting rights, or even though it is designed to remove the elements that caused objection by the Attorney General to a prior submitted change, must meet the Section 5 preclearance requirement." 28 CFR § 51.11 (1984).

Among the specific examples of changes listed in the regulations is "[a]ny change affecting the eligibility of persons to become or remain candidates." § 51.12. Pursuant to these regulations, the Attorney General has, since 1980, reviewed approximately 58 changes in election dates and approximately 10 changes in dates for candidate filing periods. In none of these instances did the Attorney General advise the covered jurisdiction that its submission was not a "change," and on several occasions objections were interposed.[30]

Appellees argue that these changes in voting procedures were exempt from preclearance because literal compliance with § 5 was impossible. The Attorney General did not approve the November election date until after that date had passed; hence, it was necessary to schedule another election date. Also, it is said that if the legislature had passed a statute setting a March election date and submitted it to the Attorney General, preclearance might not have been obtained by the date of the March election. In that event, yet another amendment would have been necessary, requiring yet another submission. The process might have continued *ad infinitum.*

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[29] See, *e. g., United States* v. *Sheffield Board of Comm'rs,* 435 U. S. 110, 131 (1978) (deference should be accorded to Attorney General's construction of the Act, especially in light of the extensive role played by the Attorney General in drafting the statute and explaining its operation to Congress); *Dougherty County, supra,* at 39.

[30] Brief for United States as *Amicus Curiae* 13–14, and n. 7.

To the extent that appellees found themselves in a dilemma, however, it was largely of their own making. Rather than submitting Act No. 549 shortly after its passage, which would have allowed ample time for preclearance before the scheduled opening of the filing period, the State delayed this action for two months.[31] Even after Act No. 549 received clearance too late to allow the election to be held in November, appellees might still have submitted the new election date without encountering significant inconvenience. Because the Attorney General must respond to any submission within 60 days after he receives the necessary information,[32] appellees need only have selected an election date sufficiently far in the future to allow preclearance.

Appellees would have us hold that the changes here at issue did not require preclearance because they were undertaken in good faith, were merely an attempt to implement a statute that had already been approved by the Attorney General, and were therefore an improvement over prior voting procedures. But the Attorney General's approval of Act No. 549 signified only that it was not discriminatory, not that it was an improvement over Act No. 547, which had also been approved. Furthermore, neither the absence of discriminatory purpose nor a good-faith implementation of a change removes the potential for discriminatory effects.[33]

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[31] Appellees imply that they were unable to submit Act No. 549 until after it had been approved in the May referendum. But the Department's regulations explicitly provide for submission of statutes before such ratification has been obtained. See 28 CFR § 51.20 (1984). Thus, the Act could have been submitted as soon as it was signed into law on April 9, a full 129 days before the filing period opened on August 16.

[32] See 28 CFR §§ 51.8, 51.35, 51.37 (1984).

[33] See S. Rep. No. 97–417, at 12, n. 31 ("even when changes are made for valid reasons, for example, reapportionment or home rule, 'jurisdictions may not always take care to avoid discriminating against minority voters in the process'") (quoting S. Rep. No. 94–295, p. 18 (1975)). See also *Allen* v. *State Board of Elections*, 393 U. S., at 565, n. 29 (that a change was undertaken in an attempt to comply with the Act does not exempt it from

More fundamentally, it is not our province, nor that of the District Court below, to determine whether the changes at issue in this case in fact resulted in impairment of the right to vote, or whether they were intended to have that effect. That task is reserved by statute to the Attorney General or to the District Court for the District of Columbia. Our inquiry is limited to whether the challenged alteration has the *potential* for discrimination.[34] The changes effected here did have such potential and therefore should have been precleared under § 5.

III

Relying on *Berry* v. *Doles*, 438 U. S. 190 (1978), the District Court held as an alternative ground that these changes were implicitly approved when the Attorney General withdrew his objection to Act No. 549. *Berry* involved changes in voting procedures that were implemented without first being submitted to the Attorney General. In a decision rendered after the election had already taken place, a three-judge District Court held that the changes should have been submitted under § 5 and enjoined further enforcement of the statute, but refused to set aside the election. We held that the appropriate remedy was to allow the covered jurisdiction 30 days in which to apply for approval of the change. We further stated:

> "If approval is obtained, the matter will be at an end. If approval is denied, appellants are free to renew to the District Court their request for [a new election.]" *Id.*, at 193.

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§ 5; "[t]o hold otherwise would mean that legislation, allegedly passed to meet the requirements of the Act, would be exempted from § 5 coverage—even though it would have the effect of racial discrimination").

[34] See *McCain* v. *Lybrand*, 465 U. S., at 250; *Dougherty County Board of Education* v. *White*, 439 U. S., at 42; *Georgia* v. *United States*, 411 U. S., at 534; *Perkins* v. *Matthews*, 400 U. S., at 383–385; *Allen* v. *State Board of Elections*, *supra*, at 555, n. 19, 570.

From this, the District Court drew the conclusion that "a retroactive validation of an election law change under Section 5 could be achieved by after-the-fact federal approval."[35]

Regardless of whether this is a fair characterization of the holding of *Berry*, it clearly has no application to the facts of this case. The changes we have identified here—the retention of an August filing period in conjunction with a March election, and the scheduling of the March election—had not even been decided upon by state authorities at the time the Attorney General approved Act No. 549. That statute provided for an August filing period and a *November* election, which, as we have demonstrated, is quite another matter. Even an informal submission of a change in voting procedures does not satisfy the requirements of § 5: the change must be submitted "in some unambiguous and recordable manner." *Allen*, 393 U. S., at 571. See also *McCain* v. *Lybrand*, 465 U. S. 236 (1984); *United States* v. *Sheffield Board of Comm'rs*, 435 U. S. 110, 136 (1978). A change that was never submitted at all does not meet this standard. The Attorney General cannot be said to have validated these changes, retroactively or otherwise, because they were never before him.

IV

Appellees' use of an August filing period in conjunction with a March election, and the setting of the March election date itself, were changes that should have been submitted to the Attorney General under § 5. These changes cannot be said to have been approved along with Act No. 549. As in *Berry* v. *Doles*, *supra*, it is appropriate in these circumstances for the District Court to enter an order allowing appellees 30 days in which to submit these changes to the Attorney General for approval. 438 U. S., at 192–193. If appellees fail to seek this approval, or if approval is not forthcoming, the results of the March 1983 election should be set aside. If, however, the Attorney General determines that the changes had no discriminatory purpose or effect, the District Court should determine, in the exercise of its equitable discretion, whether the results of the election may stand.[36]

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[35] App. to Juris. Statement 10a.

We therefore reverse the District Court's judgment that § 5 was not violated by appellees' failure to secure approval of these changes, and remand for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE POWELL and JUSTICE REHNQUIST concur in the judgment.

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[36] In *Berry*, we stated that if the Attorney General gave his after-the-fact approval to the challenged alterations in voting procedure, "the matter will be at an end." 438 U. S., at 193. In that case, however, the District Court had previously acknowledged that the changes were covered by § 5 and had reached the question of an appropriate remedy. In this case, however, the District Court erroneously concluded that the changes were outside the scope of § 5 and never engaged in the equitable weighing process necessary to determine whether failure to submit a covered change for preclearance requires that an election be set aside. The factors to be weighed include "the nature of the changes complained of, and whether it was reasonably clear at the time of the election that the changes were covered by § 5." *Perkins* v. *Matthews*, *supra*, at 396.

The determination whether a change has a discriminatory purpose or effect, which is committed by statute to the Attorney General, is distinct from the determination whether failure to submit the change requires that the election be set aside. The latter determination must be made by the District Court, after the Attorney General has passed on the substantive nature of the change.

HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* TURNER ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 83-1097. Argued October 9, 1984—Decided February 27, 1985

Section 402(a)(7)(A) of the Social Security Act (Act) provides that the responsible agency of a State participating in the Aid to Families with Dependent Children (AFDC) program must, in determining a family's need, take into consideration "any other income and resources" of the family. Before 1981, § 402(a)(7) also required the state agency to consider any "expenses reasonably attributable to the earning of any such income," and under such provision virtually all States deducted mandatory payroll-tax witholdings in determining "income." In 1981, the Act was amended by the Omnibus Budget Reconciliation Act (OBRA) so as to (1) eliminate the requirement of § 402(a)(7) that the State consider expenses "reasonably attributable" to the earning of income, and (2) provide in § 402(a)(8)(A)(ii) that the state agency shall "disregard from the earned income" a monthly flat sum of $75. Petitioner Secretary of Health and Human Services then advised the responsible state agencies that mandatory payroll deductions were to be included in the new $75 work-expense disregard, which was to be taken from gross rather than net income, and the State of California issued regulations implementing petitioner's directions. In a class action in Federal District Court challenging the California regulations, the court held that the regulations misconstrued the term "income" in § 402(a)(7) to mean gross income rather than net income, and thereby incorrectly subsumed mandatory tax withholdings within the work expenses covered by the flat-sum disregard of § 402(a)(8)(A)(ii), rather than independently deducting such withholdings when calculating income under § 402(a)(7). The Court of Appeals affirmed.

Held: In calculating a family's need for AFDC benefits, the responsible state agency must treat mandatory tax withholdings as a work expense encompassed within the flat-sum disregard of § 402(a)(8)(A)(ii), rather than as a separate deduction in determining "income" under § 402(a)(7)(A). Pp. 193–212.

(a) The Act makes no explicit provision for the deduction of mandatory payroll-tax withholdings, nor does it qualify the meaning of income. But a common-sense meaning of "earned income," as reflected in existing regulations, includes tax withholdings since portions of salary or wages withheld to meet tax obligations are "earned." Since earned income includes tax withholdings, so, too, does the broader category of "income." The congressional Reports accompanying the OBRA amendments make clear that Congress provided the flat-sum disregard in lieu of itemized work expenses, and there is no support in the statutory language or structure for any inference that Congress contemplated an additional but unmentioned deduction for tax liabilities. The administrative background against which the OBRA Congress worked also supports the conclusion that mandatory tax withholdings were among the items Congress intended to include within the flat-sum disregard. Pp. 193–199.

(b) The Court of Appeals erred in concluding that the substitution of the flat-sum disregard for the work-expense disregard of § 402(a)(7) had no effect on the treatment of mandatory tax withholdings because they always had been excluded from a working recipient's "income" for purposes of § 402(a)(7) by virtue of the principle of "actual availability" of income and thus should continue to be deducted from earnings as the first step in any determination of need. The principle of actual availability has not been understood to distinguish the treatment of tax withholdings from that of other work expenses. Pp. 199–204.

(c) By concluding that the OBRA Congress could not have intended to include mandatory tax withholdings in the flat-sum disregard because such a rule would dilute financial incentives to work, the Court of Appeals ignored the congressional choices manifest in the departure from approaches previously favored. The legislative history indicates that Congress embarked on a new course, emphasizing work requirements over financial incentives. Pp. 204–208.

(d) Subsequent congressional action dispels any doubt as to the OBRA Congress' intention that mandatory tax withholdings be treated as standard work expenses subsumed by the flat-sum disregard, not as an independent deduction. Particularly, the Deficit Reduction Act of 1984 (which became law after certiorari was granted in this case) amended § 402(a)(8) to provide that "in implementing [the section], the term 'earned income' shall mean gross earned income, prior to any deductions for taxes or for any other purposes." The legislative history demonstrates that Congress enacted this provision in order to resolve the dispute presented here. Pp. 208–211.

707 F. 2d 1109, reversed.

BLACKMUN, J., delivered the opinion for a unanimous Court.

Carter G. Phillips argued the cause for petitioner. On the briefs were *Solicitor General Lee, Acting Assistant Attorney*

General Willard, Deputy Solicitor General Geller, Richard G. Wilkins, William Kanter, and *Richard A. Olderman.* *John K. Van De Kamp,* Attorney General of California, and *John J. Klee, Jr.,* Deputy Attorney General, filed a brief for state respondents, respondents under this Court's Rule 19.6.

Mark N. Aaronson argued the cause for AFDC respondents. With him on the brief was *John E. Peer.**

JUSTICE BLACKMUN delivered the opinion of the Court.

This litigation concerns the proper computation of benefits to working recipients of Aid to Families with Dependent Children (AFDC), provided pursuant to subch. IV, pt. A, of the Social Security Act of 1935 (Act), as amended, 42 U. S. C. § 601 *et seq.* Specifically, we must decide whether, in calculating a household's need, the responsible state agency is to treat mandatory tax withholdings as a work expense encompassed within the flat-sum disregard of § 402(a)(8)(A)(ii) of the Act, 42 U. S. C. § 602(a)(8)(A)(ii), or whether the agency is to deduct such sums in determining "income" under § 402(a)(7)(A) of the Act, 42 U. S. C. § 602(a)(7)(A). The latter interpretation, of course, would accrue to the benefit of the recipient.

I

Before 1981, § 402(a)(7) of the Act required the state agency responsible for calculating a family's eligibility for AFDC benefits to "take into consideration any . . . income and resources of any child . . . claiming aid," as well as any

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**Kenneth O. Eikenberry,* Attorney General, and *Charles F. Murphy,* Assistant Attorney General, filed a brief for the State of Washington as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the State of New Mexico by *Paul Bardacke,* Attorney General, *Richard J. Rubin,* and *David Stafford;* and for the State of New York by *Robert Abrams,* Attorney General, *R. Scott Greathead,* First Assistant Attorney General, *Peter H. Schiff,* and *Judith A. Gordon* and *Marion R. Buchbinder,* Assistant Attorneys General.

"expenses reasonably attributable to the earning of any such income." See Pub. L. 87–543, § 106(b), 76 Stat. 188 (1962). The Omnibus Budget Reconciliation Act of 1981 (OBRA), Pub. L. 97–35, 95 Stat. 357, however, effected amendments of § 402(a)(7). While preserving the language that instructs the State to consider a family's income and resources, Congress, in § 2302 of OBRA, 95 Stat. 844, eliminated the requirement that the State take into account "expenses reasonably attributable to the earning of any such income." At the same time, by § 2301, 95 Stat. 843, Congress placed in § 402(a)(8)(A)(ii), 42 U. S. C. § 602(a)(8)(A)(ii), a flat $75 "work expense" deduction or "disregard" to be taken from an individual's "earned income."

In response to these amendments, petitioner Secretary of Health and Human Services advised the responsible state agencies that mandatory payroll deductions were to be included in the new $75 work-expense disregard and that this disregard was to be taken from gross rather than net income. The State of California promptly issued regulations implementing these directions;[1] this had the effect of significantly reducing benefits paid to approximately 45,000 California AFDC families with working members.

Respondents, a class of all past, present, and future California AFDC recipients who have been or will be affected by the changes wrought in the AFDC program by OBRA, brought this action in the United States District Court for the Northern District of California to challenge the California regulations implementing the Secretary's directions. They contended that the regulations misconstrued the term "income" in § 402(a)(7) to mean gross income, and thereby incorrectly relegated mandatory payroll deductions to the work expenses covered by the flat-sum disregard of § 402(a)(8); instead, according to respondents, they were entitled to have these mandatory payroll items disregarded by the State when calculating income and resources under § 402(a)(7). The State of California brought the Secretary into the litigation as a third-party defendant.

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[1] California Department of Social Services, Manual of Policy and Procedure, Eligibility and Assistance Standards § 44–113.21 (Nov. 1981).

The District Court agreed with the plaintiff class. It therefore granted respondents' motion for summary judgment, as well as the State's motion for summary judgment against the Secretary. The court enjoined the State from implementing its new regulations and the Secretary from terminating federal matching funds due the State. *Turner* v. *Woods*, 559 F. Supp. 603 (1982).

On appeal, the United States Court of Appeals for the Ninth Circuit affirmed. *Turner* v. *Prod*, 707 F. 2d 1109 (1983). Finding the statutory language unhelpful, it scrutinized the legislative history and the administrative interpretation of the two statutory provisions before relying primarily on "congressional purpose" to conclude that § 402(a)(7) "income" had always been net income after deduction of amounts mandatorily withheld for payment of social security, federal, state, and local taxes. Therefore, it concluded, the substitution of the flat-sum disregard of § 402(a)(8) for the work-expense disregard of § 402(a)(7) had had no effect on the independent deduction of tax withholdings in determining need.

The other Courts of Appeals to address the issue have concluded that Congress intended the flat work-expense disregard of § 402(a)(8) to encompass mandatory payroll withholdings, and that "income" for purposes of § 402(a)(7) was gross income.[2] We granted certiorari to resolve the conflict. 465 U. S. 1064 (1984). On July 19, 1984, after the writ had issued but before this Court heard oral argument, the Deficit Reduction Act of 1984, Pub. L. 98–369, 98 Stat. 494, became law. This new legislation includes a provision, § 2625(a),

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[2] See *Dickenson* v. *Petit*, 728 F. 2d 23 (CA1 1984), cert. pending, No. 83–6769; *James* v. *O'Bannon*, 715 F. 2d 794 (CA3 1983), cert. pending *sub nom. James* v. *Cohen*, No. 83–6168; *Bell* v. *Massinga*, 721 F. 2d 131 (CA4 1983), cert. pending, No. 83–6269.

98 Stat. 1135, that directly addresses the issue raised by this case. On the basis of that congressional action, JUSTICE REHNQUIST, in his capacity as Circuit Justice for the Ninth Circuit, prospectively stayed the injunction from July 18, 1984. 468 U. S. 1305 (1984) (in chambers). We now reverse the judgment of the Court of Appeals.

II

"The AFDC program is based on a scheme of cooperative federalism." *King* v. *Smith,* 392 U. S. 309, 316 (1968). Established by Title IV of the Social Security Act of 1935, 49 Stat. 627, "to provide financial assistance to needy dependent children and the parents or relatives who live with and care for them," *Shea* v. *Vialpando,* 416 U. S. 251, 253 (1974), the federal program reimburses each State which chooses to participate with a percentage of the funds it expends. § 403, 42 U. S. C. § 603. In return, the State must administer its assistance program pursuant to a state plan that conforms to applicable federal statutes and regulations. § 402, 42 U. S. C. § 602. Among these provisions are the two relevant here—§ 402(a)(7), which requires consideration of "income" for purposes of determining need, and § 402(a)(8), which requires the State to disregard certain sums from a recipient's income in making that determination.[3]

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[3] The State, however, is afforded "broad discretion in determining both the standard of need and the level of benefits." *Shea* v. *Vialpando,* 416 U. S. 251, 253 (1974); see *King* v. *Smith,* 392 U. S. 309, 318–319 (1968). The state plan first establishes the statewide standard of need, "which is the amount deemed necessary by the State to maintain a hypothetical family at a subsistence level," *Shea* v. *Vialpando,* 416 U. S., at 253, and then determines "how much assistance will be given, that is, what 'level of benefits' will be paid," *Rosado* v. *Wyman,* 397 U. S. 397, 408 (1970). Both eligibility and benefit amounts are determined by comparing income with the state standard of need. If a family's income "is less than the predetermined statewide standard of need, the applicant is eligible for participation in the program and the amount of the assistance payments will be based upon that difference." *Shea* v. *Vialpando,* 416 U. S., at 254. A State need not pay the entire difference, but instead may establish dollar maxima

The present controversy has its roots in a series of amendments to these two sections. As originally enacted in 1935, the Act did not expressly require a State to decrease AFDC grants to families with other income sources. Effective July 1, 1941, however, Congress added § 402(a)(7), which mandated that a state agency, in determining need, shall "take into consideration any . . . income and resources of any child claiming aid to dependent children." Social Security Act Amendments of 1939, § 401(b), 53 Stat. 1379.

This amendment, in its turn, created a new problem. Because "families with working members incurred certain employment-related expenses that reduced available income but were not taken into account by the States in determining eligibility for AFDC assistance," the Social Security Board soon "recognized that a failure to consider work-related expenses could result in a disincentive to seek or retain employment." *Shea* v. *Vialpando*, 416 U. S., at 259. To avoid defeating the purpose of the Act to encourage employment even where it did not wholly eliminate the need for public assistance, *ibid.;* see § 401, 42 U. S. C. § 601, the Board encouraged the State, in determining a family's need, to take account of the additional incidental expenses encountered by a working person.[4]

In 1962, Congress converted this administrative prompting into a statutory requirement. It amended § 402(a)(7) to

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or provide only a specified percentage of the family's need. See *Rosado* v. *Wyman*, 397 U. S., at 408–409.

The State of California, a respondent here under this Courts' Rule 19.6, has filed, with others, a brief in support of the petitioner.

[4] See App. 24, 25, Bureau of Public Assistance, Federal Security Agency, Social Security Board, State Letter No. 4 (Apr. 30, 1942) ("It should be recognized that when a person is working there may be additional needs which must be met such as additional clothing, transportation, food and the like"); App. 27, 28, Department of Health, Education, and Welfare, Social Security Administration, State Letter No. 291 (Mar. 11, 1957), incorporated as § 3140 of pt. IV of Handbook of Public Assistance Administration (1957). See also App. 37, Handbook of Public Assistance Administration, pt. IV, § 3140 (1962).

oblige the State to consider, in addition to "income and resources," all "expenses reasonably attributable to the earning of any such income." Public Welfare Amendments of 1962, Pub. L. 87–543, § 106(b), 76 Stat. 188. The amendment made "mandatory the widespread but then optional practice of deducting employment expenses from total income in determining eligibility for assistance." *Shea* v. *Vialpando*, 416 U. S., at 260.

The statute again was amended, effective July 1, 1969, to alter fundamentally the statutory treatment of earned income. Social Security Amendments of 1967, Pub. L. 90–248, § 202(b), 81 Stat. 881. Instead of merely protecting against the possibility of a disincentive, Congress moved to create an affirmative incentive to employment by adding several new deductions, or earned-income disregards. While it left intact the language of § 402(a)(7), requiring the State to take into account both a family's "income and resources" and "any expenses reasonably attributable to the earning of any such income," the amended version subjected this requirement to a new provision, § 402(a)(8). In part, the new section required the State, in computing income for purposes of determining need, to disregard the first $30 of "earned income" in any month, "plus one-third of the remainder of such income for such month." 81 Stat. 881.[5] The effect, of course, was to decrease the amount of "earned income" and thereby to increase a family's benefits.

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[5] The statute at that time thus had come to be worded as follows:

"A state plan for aid and services to needy families with children must

. . . . .

"(7) except as may be otherwise provided in clause (8), provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, . . . as well as any expenses reasonably attributable to the earning of any such income; (8) provide that, in making the determination under clause (7), the State agency—

"(A) shall with respect to any month disregard—

. . . . .

"(ii) in the case of earned income of a dependent child [or] a relative receiving such aid . . . , the first $30 of the total of such earned income for such month plus one-third of the remainder of such income for such month . . . ."

In response to the new section, the Department of Health, Education, and Welfare, which, as successor to the Social Security Board and predecessor of the Department of Health and Human Services, was then administering the AFDC program, issued regulations defining "earned income" for purposes of § 402(a)(8), and incorporating the new disregards into the benefit calculations. "Earned income" was defined as the "total amount" of "commissions, wages, or salary," and calculated "irrespective of personal expenses, such as income-tax deductions. . . ." 45 CFR § 233.20(a)(6)(iv) (1970).

In 1981, by OBRA, Congress again significantly altered the treatment of work expenses. As noted above, in place of the requirement of § 402(a)(7) that the State consider expenses "reasonably attributable" to the earning of income, Congress substituted in § 402(a)(8) a child-care disregard of up to $160, and a flat $75 disregard, "in lieu of itemized work expenses." S. Rep. No. 97-139, p. 435 (1981). In addition, Congress restricted the "$30 plus one-third" disregard to the first four months of a recipient's employment, § 402(a)(8)(B)(ii)(II), 42 U. S. C. § 602(a)(8)(B)(ii)(II), and reduced its impact by requiring that the calculation be made after the work-expense and child-care disregards had been subtracted, § 402(a)(8)(A)(iv), 42 U. S. C. § 602(a)(8)(A)(iv).[6]

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[6] The statute thus provided:

"A state plan for aid and services to needy families with children must . . .

"(7) except as may be otherwise provided in paragraph (8) . . . , provide that the State agency—

"(A) shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children . . .

. . . . .

"(8)(A) provide that, with respect to any month, in making the determination under paragraph (7), the State agency—

. . . . .

III

A

In determining how Congress intended these tandem provisions to operate, we look first, as always, to the language of the statute. *North Dakota* v. *United States*, 460 U. S. 300, 312 (1983). We do not find this language, as informed by the structure and pattern of amendment of the relevant provisions, as unhelpful as did the Court of Appeals.

"(ii) shall disregard from the earned income of any child or relative applying for or receiving aid to families with dependent children, or of any other individual (living in the same home as such relative and child) whose needs are taken into account in making such determination, the first $75 of the total of such earned income for such month (or such lesser amount as the Secretary may prescribe in the case of an individual not engaged in full-time employment or not employed throughout the month);

"(iii) shall disregard from the earned income of any child, relative, or other individual specified in clause (ii), an amount equal to expenditures for care in such month for a dependent child . . . receiving aid to families with dependent children and requiring such care for such month, to the extent that such amount (for each such dependent child . . .) does not exceed $160 (or such lesser amount as the Secretary may prescribe in the case of an individual not engaged in full-time employment or not employed throughout the month);

"(iv) shall disregard from the earned income of any child or relative receiving aid to families with dependent children . . . an amount equal to the first $30 of the total of such earned income not disregarded under any other clause of this subparagraph plus one-third of the remainder thereof . . . ; and

. . . . .

"(B) provide that (with respect to any month) the State agency—

. . . . .

"(ii) . . .

. . . . .

"(II) in the case of the earned income of a person with respect to whom subparagraph (A)(iv) has been applied for four consecutive months, shall not apply the provisions of subparagraph (A)(iv) for so long as he continues to receive aid under the plan and shall not apply such provisions to any month thereafter until the expiration of an additional period of twelve consecutive months during which he is not a recipient of such aid."

The statute makes no explicit provision for the deduction of mandatory payroll-tax withholdings. Nor does it qualify the meaning of "income" for purposes of § 402(a)(7). Instead, that section provides that, "except as may be otherwise provided in" § 402(a)(8), the state agency's determination of need must take account of "any other income and resources" of an AFDC recipient. Section 402(a)(8), in turn, requires that specified amounts of a recipient's "earned income" be disregarded "in making the determination" under § 402(a)(7). Successive paragraphs of the statute, then, employ twin usages of the term "income"—the first expressly unqualified, the second limited to that "earned." Absent contrary indications, it seems to us to make sense to read "earned income" to represent a subset of the broader term "income." Since those portions of one's salary or wages withheld to meet tax obligations are nonetheless "earned," a common-sense meaning of "earned income" would include tax withholdings. Such an interpretation is reflected, in any event, in the Secretary's longstanding definition of the term as "the total amount [of commissions, wages, or salary], irrespective of personal expenses, such as income-tax deductions." 45 CFR § 233.20(a)(6)(iv) (1984).[7] The OBRA Congress must have had that definition in mind when it re-employed the term in § 402(a)(8). Since earned income includes mandatory tax withholdings, so too does the broader category of "income." Thus, the calculation of need must include all income, unless the recipient has earned income. In that event, the recipient gets the benefit of the disregards of § 402(a)(8). Any authorization for the deduction from § 402(a)(7) income of a working recipient's tax liabilities, even if mandatorily withheld from pay, must be found in the earned-income disregards of § 402(a)(8).

Among those disregards is the flat sum of $75 monthly. § 402(a)(8)(A)(ii). As the congressional Reports accompanying the 1981 amendments make clear, Congress provided this flat sum "in lieu of itemized work expenses." S. Rep. No. 97–139, p. 435 (1981); H. R. Conf. Rep. No. 97–208, p. 979 (1981). The substitution is apparent, as well, from the simultaneous elimination from § 402(a)(7) of the language requiring States to consider "expenses reasonably attributable to the earning of . . . income." Tax liabilities indisputably are so attributable. Indeed, they are the paradigmatic work expense: while transportation, food, clothing, and the like often are susceptible to economies, the proverbial certainty attaches to taxes. Further, the new version of § 402(a)(8) provides a separate disregard, up to $160 monthly, for child-care expenditures, another species of work expense. In contrast, the absence of a special provision conferring independent authorization to disregard mandatory tax withholdings indicates that they were thought to come within the flat deduction. In sum, there is no support in language or structure for any inference that, notwithstanding the unqualified benchmark of "any other income" in § 402(a)(7) and the specified earned-income disregards of § 402(a)(8), Congress contemplated an additional but unmentioned deduction for tax liabilities.

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[7] The current version of this regulation is identical to that originally promulgated in 1970.

The administrative background against which the OBRA Congress worked also supports the conclusion that mandatory tax withholdings were among the items Congress intended to include within the flat-sum disregard of § 402(a)(8)(A)(ii). Until 1962, there was no statutory or regulatory requirement that the States disregard work-related expenses in assessing a working recipient's income, although the successive federal agencies responsible for the AFDC program urged the States to do so as a matter of sound administrative practice. It appears that virtually all States acceded to that urging, at least to the extent of deducting mandatory tax withholdings, although practices varied widely as to other types of expenses. See App. 30–36, Bureau of Public Assistance, Social Security Administration, Department of Health, Education, and Welfare, Public Assistance Report No. 43: State Methods for Determining Need in the Aid to Dependent Children Program (March 1961). The practice of deducting withholdings continued after § 402(a)(7) was amended in 1962 expressly to require a State to take account of work expenses in determining income; of course, during this period the deduction and computation would have been the same whether the withholdings were subtracted from income pursuant to the work-expense disregard or not included in income in the first place.

The addition of the work-incentive disregard in 1967, however, made it necessary to detail the steps in the determination of need. In response, HEW promulgated detailed regulations on the application of these disregards to earned income. As noted above, one regulation, which has remained unchanged since its initial promulgation, defined "earned income" to mean

> "the total amount [of commissions, wages, or salary], irrespective of personal expenses, such as income-tax deductions, lunches, and transportation to and from work, and irrespective of expenses of employment which are not personal, such as the cost of tools, materials, special uniforms, or transportation to call on customers." 45 CFR § 233.20(a)(6)(iv) (1970).

Another regulation—which has also remained unchanged, though after OBRA it no longer applied to AFDC calculations—set forth the procedure by which the disregards would be applied:

> "The applicable amounts of earned income to be disregarded will be deducted from the gross amount of 'earned income,' and all work expenses, personal and non-personal, will then be deducted. Only the net amount remaining will be applied in determining need and the amount of the assistance payment." 45 CFR § 233.20(a)(7)(i) (1970).

The second regulation, echoing the terminology of the first, clearly treated mandatory tax withholdings as "personal" work expenses. The authority for deducting such expenses, of course, by then was the work-expense disregard of § 402(a)(7).[8]

Administrative practice reflected the taxonomy of the regulations. Sometime after 1962, but well before the OBRA Congress acted, many States had come to treat tax withholdings as expenses "reasonably attributable to the earning of . . . income." A 1972 HEW study reported that virtually every State subjected mandatory payroll withholdings to the work-expense provision of § 402(a)(7). See App. 47, Department of Health, Education, and Welfare, Memorandum, Assistance Payments Administration, Social and Rehabilitation Service (Feb. 1, 1972). The Colorado program under consideration in *Shea* was said to treat mandatory payroll deductions as "expenses reasonably attributable to employment," 416 U. S., at 254–255, and the *Shea* Court assumed as much, *id.*, at 255. And, in 1977, the House Committee on Government Operations received a comprehensive report on the AFDC program which appeared to indicate that all of the 43 States that responded to the inquiry treated mandatory tax withholdings as deductible work expenses. Congressional Research Service, Administration of the AFDC Program: A Report to the Committee on Government Operations 98 (Comm. Print 1977).

There is no reason to suppose that the Congress that enacted OBRA legislated in ignorance of the then generally accepted categorization of mandatory tax withholdings as work expenses. To the contrary, the Senate Report described Congress' understanding of existing law:

> "In determining AFDC benefits, States are required to disregard from the recipient's total income: (1) the first $30 earned monthly, plus one-third of additional

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[8] See also *Connecticut State Dept. of Public Welfare* v. *HEW*, 448 F. 2d 209, 216 (CA2 1971) (treating 45 CFR § 233.20(a)(6)(iv) (1970) to provide a nonexhaustive list of expenses reasonably attributable to the earning of income under § 402(a)(7)).

> earnings; and (2) any expenses (including child care) reasonably attributable to the earning of such income . . . ." S. Rep. No. 97–139, p. 501 (1981).

It is unlikely that Congress would have omitted so important an independent step as the disregard of tax liabilities. Instead, the parenthetical mention of child-care expenditures presages their treatment in the revised § 402(a)(8) as the only type of work expense separately disregarded.

The House Conference Report describes the new provisions to the same effect:

> "States would be required to disregard the following amount of earnings, in the following order:
>
> "(a) *Eligibility Determination*—the first $75 of monthly earnings for full time employment (in lieu of itemized work expenses); and the cost of care for a child or incapacitated adult, up to $160 per child per month.
>
> "(b) *Benefit Calculation*—the first $75 of monthly earnings for full time employment; child care costs up to $160 per child per month; and $30 plus one-third of earnings not previously disregarded." H. R. Conf. Rep. No. 97–208, pp. 978–979 (1981).

Again, we find it implausible that Congress would have provided an otherwise complete description of the proposed calculation, yet neglect to mention that "earnings" or "monthly earnings" did not include mandatory tax withholdings.

We acknowledge that the legislative history of the 1962 amendments, which codified the administrative policy that a state agency take account of work expenses in determining need, does not mention mandatory tax withholdings. See S. Rep. No. 1589, 87th Cong., 2d Sess., 17–18 (1962); H. R. Rep. No. 1414, 87th Cong., 2d Sess., 23 (1962). It is also true that in amending its guide to the States in response to the 1962 amendment of § 402(a)(7), HEW did not include such withholdings in its list of expenses reasonably attributable to the earning of income. See App. 39–41, Department of Health, Education, and Welfare, Handbook of Public Assistance Administration, pt. IV, § 3140 (Apr. 22, 1964). This silence is at best ambiguous, however. The failure to mention these expenses well may have resulted from Congress' and HEW's recognition that the States, acquiescing in the longstanding policy of the federal agencies administering AFDC that state agencies attempt realistically to ascertain recipients' need, already deducted these expenses in determining eligibility and benefit levels. As the Court of Appeals recognized, the source of the authority to reduce countable income by the amount of various work expenses was unclear at this time. 707 F. 2d, at 1120. In any event, we must identify Congress' intention in 1981. It is clear that by then the practice of disregarding amounts withheld to satisfy tax liabilities had found a statutory home in the work-expense disregard of § 402(a)(7). It is equally clear that they were among the "itemized work expenses" which the OBRA Congress intended the flat-sum disregard to replace.

B

The Court of Appeals recognized that "if mandatory payroll deductions enter into income at all, they must be treated as work-related expenses subject to the $75 ceiling enacted by OBRA, because no separate disregard for payroll withholdings exists." 707 F. 2d, at 1120. It avoided this conclusion, however, by rejecting its premise. According to the Court of Appeals, mandatory tax withholdings always had been excluded from the calculation of a working recipient's income by virtue of a long-enshrined principle of "actual availability," which, independently of any explicit statutory disregards, governed the definition of "income" for purposes of § 402(a)(7). Therefore, the substitution of the flat $75 disregard of § 402(a)(8) for the work-expense disregard of § 402(a)(7) had no effect on the treatment of tax payments, which should continue to be deducted from a working recipient's earnings as the first step in any determination of need.

We disagree. Contrary to the conclusion of the Court of Appeals, the principle of actual availability has not been understood to distinguish the treatment of tax withholdings from that of other work expenses. Rather, it has served primarily to prevent the States from conjuring fictional sources of income and resources by imputing financial support from persons who have no obligation to furnish it or by overvaluing assets in a manner that attributes nonexistent resources to recipients.

The availability principle traces its origins to congressional consideration of the 1939 amendments to the Act. At that time, some Members expressed concern, specifically with regard to the old-age assistance program, that state agencies not assume financial assistance from potential sources, such as children, who actually might not contribute. See 3 Hearings Relative to the Social Security Act Amendments of 1939 before the House Committee on Ways and Means, 76th Cong., 1st Sess., 2254 (1939) (statement of A. J. Altmeyer, Chairman, Social Security Board); 84 Cong. Rec. 6851 (1939) (statement of Rep. Poage). Shortly after passage of the 1939 amendments, the Board adopted a policy statement applicable to various aid programs, including AFDC. See App. 17–20, Social Security Board Memorandum (Dec. 20, 1940). The statement cautioned the States that in effecting the new statutory directive to take into account a recipient's "income and resources," they must ensure that any such income or resources "actually exist," be not "fictitious" or "imputed," and "be actually on hand or ready for use when it is needed." A short time later, this policy statement was incorporated in substantially the same form in the Board's guidelines to the States, see App. 21–23, and successive federal agencies administering the AFDC program have continued to endorse the principle. See, *e. g.*, HEW Handbook of Public Assistance Administration, pt. IV, § 3131.7

(1967) (quoted in *Lewis* v. *Martin,* 397 U. S. 552, 555, and n. 6 (1970)). At no time, however, have the federal AFDC agencies suggested that it demanded special treatment of mandatory tax withholdings.

This Court, too, has viewed the actual availability principle "clearly [to] comport with the statute," *King* v. *Smith,* 392 U. S., at 319, n. 16, and has not hesitated to give it effect in that case and others. See *Lewis* v. *Martin, supra; Van Lare* v. *Hurley,* 421 U. S. 338 (1975). But the Court's cases applying the principle clearly reflect that its purpose is to prevent the States from relying on imputed or unrealizable sources of income artificially to depreciate a recipient's need. For example, in *King* v. *Smith* the Court considered the actual availability regulation in holding that Alabama could not deny assistance to otherwise eligible children solely on the basis of their mother's cohabitation with a "substitute father," not their own, without regard to whether the putative substitute actually contributed to the children's support. 392 U. S., at 319–320, and n. 16.

The failure of the federal agencies administering AFDC to apply the availability principle to distinguish mandatory tax withholdings is not surprising. The sums they consume are no less available for living expenses than other sums mandatorily withheld from the worker's paycheck and other expenses necessarily incurred while employed. In implicit recognition of this analytic difficulty, the Court of Appeals, without helpful explanation,[9] purported to clarify the District Court's ruling by excluding "non-governmental deductions" from its compass, specifying that only federal, state, and local income taxes, social security taxes, and "state disability and equivalent governmental programs" could properly be denominated "non-income items." 707 F. 2d, at 1124. The individual respondents make an identical concession, Brief for AFDC Respondents 46, but they, also, fail to trace a similarly circumscribed rationale. Yet sums mandatorily withheld for obligations such as union dues, medical insurance, or retirement programs no more pass through the wage earner's hands than do mandatory tax withholdings. Insofar as the Court of Appeals' definition pivots on availability to meet family expenses, any distinction between various species of payroll withholdings would be "metaphysical indeed." *James* v. *O'Bannon*, 557 F. Supp. 631, 641 (ED Pa. 1982), aff'd, 715 F. 2d 794 (CA3 1983), cert. pending *sub nom. James* v. *Cohen*, No. 83–6168. Likewise, the expenditure of funds on other work-related expenses, such as transportation, meals, and uniforms, just as effectively precludes their use for the needs of the family. That they first pass through the wage earner's hands is a difference of no apparent import: "the time of payment seems . . . but a superficial distinction; all necessary expenses must be met sometime." *Dickenson* v. *Petit*, 728 F. 2d 23, 25 (CA1 1984), cert. pending, No. 83–6769. There is no reason, then, why the actual availability principle, once applied to exclude mandatory tax withholdings from the definition of income, would not similarly apply to other mandatory payroll withholdings and other standard work expenses, both of which also render a portion of a wage earner's income unavailable to meet the recipient family's needs. Yet this would negate Congress' enactment of the flat-sum work-expense disregard in 1981. The failure of the Court of Appeals to outline a principled limit to the applicability of the availability principle to sums deducted from gross income is telling.

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[9] The Court of Appeals suggested that tax withholdings "are easily verified," 707 F. 2d, at 1124, but so too are any other amounts whose deduction a payroll stub records.

The Court of Appeals, however, thought it "clear that the agency charged with the administration of this statute has long regarded it as dealing with net income exclusively." 707 F. 2d, at 1115. To support this conclusion, it cited the then-current regulation embodying the availability principle, which, as republished after OBRA, provided that "'in determining need and the amount of the assistance payment . . . *[n]et* income . . . and resources available shall be considered . . . .'" *Ibid.*, quoting 45 CFR § 233.20(a)(3)(ii)(D) (1983), as amended by 47 Fed. Reg. 5647, 5675 (1982) (emphasis supplied by Court of Appeals).[10] The court, in our view, however, ignored the context in which the term "net income" appeared. The "net income" to which the regulation then referred was that for which the recipient family must account "after all policies governing the reserves and allowances and disregard or setting aside of income and resources . . . have been uniformly applied." 45 CFR § 233.20(a)(3)(ii) (1983); see also 45 CFR § 233.20(a)(3)(ii)(*a*) (1970). Among those "policies governing . . . disregard" was that governing earned income, which provided that "[o]nly the net amount remaining" after application of the work-incentive and work-expense disregards would be applied in determining need. 45 CFR § 233.20(a)(7)(i) (1970). This Court recognized the proper referent of "net income and resources" in *Shea* v. *Vialpando*, where we observed with regard to an earlier version of the regulation:

> "The 'income and resources' attributable to an applicant, defined in 45 CFR §§ 233.20(a)(6) (iii–viii), consist generally of 'only such net income as is actually available for current use on a regular basis . . . and only currently available resources.' 45 CFR § 233.20(a)(3)(ii)(c). . . . *In determining net income, any expenses reasonably attributable to the earning of income are deducted from gross income. 42 U. S. C. § 602(a)(7).* If, taking into

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[10] In the 1984 version of the regulation, the words "[n]et income" are replaced by "[i]ncome after application of disregards." 45 CFR § 233.20(a)(3)(ii)(D) (1984). There are also other changes in subparagraph (D). See 49 Fed. Reg. 35586, 35592, 35600 (1984). The text at p. 35592 explains that the changes were in response to the Deficit Reduction Act to correct the "misinterpret[ations]" of the phrase "net income" in the prior version.

> account these deductions and other deductions not at issue in the instant case, the net amount of 'earned income' is less than the predetermined statewide standard of need, the applicant is eligible for participation in the program and the amount of the assistance payments will be based upon that difference. 45 CFR § 233.20 (a)(3)(ii)(a) and (c)" (emphasis supplied). 416 U. S., at 253–254.

Thus, it is apparent that the net amount to which the regulation refers is that remaining after AFDC disregards, not simply payroll withholdings.

Finally, even accepting the view of the Court of Appeals that § 402(a)(7) "income" does not encompass mandatory tax withholdings, one reaches a much more limited result than respondents seek. In the face of the straightforward regulatory definition of "earned income" and Congress' re-employment of that term in reworking the § 402(a)(8) disregards, it is clear that the flat-sum disregard is to be deducted from total earned income, including mandatory tax withholdings, as provided by § 402(a)(8) and its implementing regulations. The putative rule excluding tax withholdings as "non-income items" under § 402(a)(7) income would also take total earnings as its starting point. Thus, the benefits each provides would be duplicative until deductions exceeded $75. Respondents' understanding of § 402(a)(7) would simply require the state agency to permit recipients to deduct the greater of either actual payroll deductions or $75. No party urges this construction, of course, because it would have been a senseless and cumbersome way for Congress to achieve such a result. But, for us, it demonstrates the implausibility of respondents' view of the interplay of § 402(a)(7) and § 402(a)(8).

C

Notwithstanding its conclusion that the actual availability principle had always governed the treatment of mandatory tax withholdings in calculating an AFDC family's need, and continued to do so after enactment of OBRA, the Court of Appeals looked "primarily to congressional purpose" for its holding that these withholdings should be deducted independently of the flat-sum disregard. 707 F. 2d, at 1110. As the court noted, the AFDC statute has long sought to

> "enabl[e] each State to furnish financial assistance . . . to needy dependent children and the parents or relatives with whom they are living . . . and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection . . . ." § 401, 42 U. S. C. § 601.

See *Shea* v. *Vialpando*, 416 U. S., at 253. While acknowledging the cost-cutting focus of the OBRA amendments, the Court of Appeals reasoned that its construction best accommodated what it saw as the competing purposes of the 76th and 97th Congresses. First, citing the elimination after the first four months of employment of the $30 and one-third, work-incentive disregard, which it regarded as OBRA's "chief economizing feature," as well as the imposition of a cap on the child-care and work-expense disregards, the court opined that other changes in the statutory disregards fully accomplished any budgetary savings intended by the OBRA Congress. Next, it reasoned that the unchanged statement of statutory purpose compelled its construction, which still resulted in a disincentive to employment, because it produced a lesser disincentive than that effected by the Secretary's regulations. Finally, seeing "no reason to believe that AFDC recipients will work in order to pay handsomely for the privilege," it decided that in the long term the OBRA Congress' desire to reduce welfare expenditures would best be accomplished by avoiding or minimizing financial penalties on employed recipients. 707 F. 2d, at 1123.

We agree with the Court of Appeals that the OBRA Congress neither changed the language of the AFDC statement of purpose nor abandoned the statutory goals. We also agree that the new scheme, as implemented by the Secretary, threatens to dissipate any incentive to employment, in some cases perhaps even forcing recipients who wish to work to apportion a smaller sum to family expenses than if they stayed at home. Unlike the Court of Appeals, however, we hesitate to tell Congress that it might have achieved its budgetary objectives by less than the full range of changes it chose to utilize, particularly when the information provided Congress by its own Budget Office, on which it presumably relied, belies that conclusion. See S. Rep. No. 97–139, at 447, 552. More importantly, it seems plain to us that the risk of creating disincentives to employment that would lead to increased expenditures down the road did not trouble the OBRA Congress.

During the House hearings on the OBRA changes to the AFDC statute, Representative Stark voiced concern that the new scheme would put a working mother to the distressing choice of either quitting her job or making do with less money to devote to her family's needs. See Administration's Proposed Savings in Unemployment Compensation, Public Assistance, and Social Services Programs: Hearings before the Subcommittee on Public Assistance and Unemployment Compensation of the House Committee on Ways and Means, 97th Cong., 1st Sess., Ser. No. 97–7, p. 3 (Comm. Print 1981). Representative Rangel feared that "[t]he marginally poor, actually penalized . . . for working, would have a great disincentive to continue to work." *Id.*, at 41. Other Members and numerous private witnesses issued similar warnings. See, *e. g.*, *id.*, at 26 (Rep. Russo); *id.*, at 46 (Rep. Chisholm); *id.*, at 318 (Kevin M. Aslanian, Welfare Recipients League, Inc.). And the report of the Congressional Budget Office, included in the Senate Report, expressly called Congress' attention to the possibility that the work-expense cap and temporal limitation on the work incentive disregard would "increase the work disincentives found in the current AFDC program." S. Rep. No. 97–139, at 552.

In the face of these warnings, we must assume that Congress enacted the proposed changes in full awareness of the employment disincentives some Members felt the changes threatened to create.

Indeed, the concerns which underlay the decision of the Court of Appeals in this case prompted the House Subcommittee on Public Assistance and Unemployment Compensation to draft a version of § 402(a)(8) which would have increased substantially the flat work-expense disregard. The Subcommittee proposed to allow a work-expense deduction of the lesser of 20% of earned income or $175. See 127 Cong. Rec. 14476 (1981). But the House rejected this version and, instead, passed a substitute identical to that passed by the Senate. See *id.*, at 14681–14682; H. R. Conf. Rep. No. 97–208, at 978–979. Again, Members sounded warnings of the consequences of the administration substitute. See 127 Cong. Rec. 14104 (1981) (Rep. Rostenkowski); *id.*, at 14663–14664 (Rep. Biaggi). These concerns, however, did not deter the OBRA Congress.

Instead, as the Court of Appeals for the Third Circuit has observed, the legislative history indicates that, "[h]aving determined that providing financial incentives for work was not achieving the goal of self-sufficiency and that such incentives were leading to ever-increasing public expenditures, Congress embarked on a new course." *James* v. *O'Bannon*, 715 F. 2d, at 809. In proposing to limit the $30 and one-third disregard to the first four months of employment, for example, the Senate Budget Committee expressed impatience that the program then in effect was not inducing AFDC mothers to achieve self-sufficiency. S. Rep. No. 97–139, at 502–503. As a result, Congress sought other means that, in combination with the now temporally limited work-incentive disregard, might "decrease welfare dependency, and emphasize the principle that AFDC should not be regarded as a permanent income guarantee." *Ibid.* It chose to authorize the States to establish programs aimed at promoting employment among AFDC recipients. A State could establish a "community work experience program . . . designed to improve the employability of participants through actual work experience and training," § 409(a)(1), 42 U. S. C. § 609(a)(1), and it could condition AFDC eligibility on participation in the program. H. R. Conf. Rep. No. 97–208, at 980. A State could establish a "work supplementation program," under which it would "make jobs available, on a voluntary basis, as an alternative to aid otherwise provided under the State plan." § 414(a), 42 U. S. C. § 614(a). "Under this approach, recipients would be given a choice between taking a job or depending upon a lower AFDC grant . . . ." H. R. Conf. Rep. No. 97–208, at 980. And the State could establish a "work-incentive demonstration program" as an alternative to current work-incentive programs. § 445, 42 U. S. C. § 645; see H. R. Conf. Rep. No. 97–208, at 981. Participation in such a program would also be mandatory for persons eligible for AFDC. § 445(b)(1)(B), 42 U. S. C. § 645(b)(1)(B). See also § 402(a)(19), 42 U. S. C. § 602(a)(19). In conjunction with the amendments to the earned-income disregards, these provisions suggest a change in strategy on Congress' part—away from financial incentives and toward programs designed to find employment for recipients and oblige them to take it.

Thus, it is clear that the OBRA Congress elected to pursue unchanged goals by new methods. By concluding that Congress could not have intended to include mandatory tax withholdings in the new $75 disregard because such a rule would dilute financial incentives to work, the Court of Appeals ignored the congressional choices manifest in the departure from approaches previously favored.

D

Were there any doubt remaining as to Congress' intention in 1981, subsequent congressional action would dispel it. In the immediately succeeding session, certain Members of the

House Committee on Ways and Means introduced H. R. 6369, 97th Cong., 2d Sess. (1982), by which they attempted to restore the financial work incentives eliminated by OBRA. The attempt failed. The Report accompanying the bill, however, describes the pre-OBRA state of the law. The Committee first noted that the "countable income" which determined eligibility equaled "gross income minus the disregards." H. R. Rep. No. 97–587, pt. 1, p. 6 (1982). Later, it referred to the potential disincentive posed, prior to the 1962 and 1967 amendments, by "any work-related expenses—such as transportation and child day care costs, and mandatory tax and other wage deductions." *Id.*, at 12. It also listed the components of an AFDC family's pre-OBRA "disposable income (wages minus work expenses plus AFDC benefits)." *Ibid.* Finally, it recounted the pre-OBRA calculation of need: "States were required to reduce the State monthly payment by the amount of the family's earnings that remained after the following amounts had been excluded or disregarded: (1) the first $30 of earnings; (2) plus one-third of remaining earnings; (3) plus work expenses for the month (any expenses, including child day care, reasonably attributable to the earning of income)." *Ibid.* Each of these statements indicates that the OBRA Congress regarded mandatory tax withholdings as standard work expenses; none admits of the possibility that they might have constituted an independent deduction.

We take great care, of course, before relying on the understandings of Members of a subsequent Congress as to the actions of an earlier one, but we by no means eschew what guidance they offer. *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U. S. 102, 117–120, n. 13 (1980); *Cannon* v. *University of Chicago*, 441 U. S. 677, 686–687, n. 7 (1979). Here, we face the considered statements of a Committee whose Members were in the thick of the fight over earned-income disregards in the preceding session of the same Congress. And those statements clearly reveal the common ground of that fight that the existing scheme did not independently disregard mandatory tax withholdings, but grouped them with other work expenses which the new flat-sum disregard would subsume.

The most recent confirmation of Congress' intentions in this matter came with enactment of the Deficit Reduction Act of 1984, Pub. L. 98–369, 98 Stat. 494, which, by its §2625, 98 Stat. 1135, amends §402(a)(8) to provide that "in implementing [the section], the term 'earned income' shall mean gross earned income, prior to any deductions for taxes or for any other purposes." The legislative history demonstrates that Congress enacted this provision in order to resolve the very dispute presented here. Specifically noting that the Courts of Appeals had come to conflicting conclusions on the matter and that this Court had granted the petition for certiorari in this case, the Conference Report leaves no doubt that Congress intended to endorse the competing construction. H. R. Conf. Rep. No. 98–861, pp. 1394–1395 (1984). The Senate echoed the House explanation:

> "The statute would be amended to make clear that the term 'earned income' means the gross amount of earnings, prior to the taking of payroll or other deductions. The provisions in the AFDC statute which require that specified amounts of earned income be disregarded in determining eligibility and benefits have historically been interpreted as requiring that such amounts be deducted from gross, rather than net, earnings.
>
> "The Committee agrees with the Department that there was no intention to change this interpretation when it approved the 1981 AFDC amendments. The Committee notes that when the Congressional Budget Office estimated the savings expected to be derived from the changes in 1981, it followed the interpretation shared by the Department and the Committee that the proposed disregards would apply to gross earnings." 1 Senate

> Committee on Finance, Deficit Reduction Act of 1984, 98th Cong., 2d Sess., 982 (Senate Print 98–169, 1984).

Thus, the 98th Congress reiterated its immediate predecessor's intentions not just by words but by deed—not only did it express in legislative history the "histori[c] interpret[ation]" of the relevant income, but it found it sufficient in resolving the disagreement to amend only § 402(a)(8). This 1984 legislation, which, it was said, sought to "[c]larif[y] current law," Senate Print, at 79, leaves no doubt as to the prospective interpretation of the statute,[11] but it carries in addition considerable retrospective weight. *Fidelity Federal Savings & Loan Assn.* v. *De la Cuesta,* 458 U. S. 141, 166–167, and n. 19 (1982); *Red Lion Broadcasting Co.* v. *FCC,* 395 U. S. 367, 380–381 (1969); *FHA* v. *The Darlington, Inc.*, 358 U. S. 84, 90 (1958). In conjunction with contemporaneous evidence and the 1982 House Report, it removes all doubt.

IV

In sum, while it appears that from the early days of the AFDC program the States regularly have excluded mandatory tax withholdings when determining need, it is clear to us that from some time after the addition in 1962 of the work-expense disregard of § 402(a)(7), and certainly by the time of OBRA, they did so pursuant to the directive of that section to disregard expenses "reasonably attributable" to the earning of income. All the available evidence indicates that the Congress that enacted the OBRA changes in the AFDC program also viewed tax liabilities as work expenses subject to the § 402(a)(7) disregard. That congressional understanding compels the conclusion that mandatory tax withholdings were among the items encompassed by the flat-sum disregard of § 402(a)(8).

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[11] See *Heckler* v. *Turner*, 468 U. S. 1305, 1306–1307 (1984) (REHNQUIST, J., in chambers).

Respondents and their *amici* have offered various policy reasons why the disincentive to employment effected by the failure fully to account for work expenses is wrong. They point to the value, both pecuniary and inherent, of the search for and maintenance of employment, as well as to the long-term costs to the States in discouraging AFDC families' efforts toward economic independence. We, however, do not sit to pass on policy or the wisdom of the course Congress has set. Our task is only to determine that the Secretary has identified it correctly. We are satisfied that she did.

The judgment of the Court of Appeals is reversed.

It is so ordered.

DEAN WITTER REYNOLDS INC. *v.* BYRD

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 83–1708. Argued December 4, 1984—Decided March 4, 1985

In 1981, respondent invested $160,000 in securities through petitioner broker-dealer. The parties had a written agreement to arbitrate any disputes that might arise out of the account. Thereafter, the value of the account declined by more than $100,000. Respondent then filed an action against petitioner in Federal District Court, alleging violations of the Securities Exchange Act of 1934 and of various state-law provisions. Petitioner filed a motion to compel arbitration of the pendent state claims under the parties' agreement and to stay arbitration pending resolution of the federal action. Petitioner argued that the Federal Arbitration Act—which provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for revocation of any contract"—required the District Court to compel arbitration of the state claims. The District Court denied the motion, and the Court of Appeals affirmed.

Held: The District Court erred in refusing to grant petitioner's motion to compel arbitration of the state claims. Pp. 216–224.

(a) The Arbitration Act requires district courts to compel arbitration of pendent arbitrable claims when one of the parties files a motion to compel, even when the result would be the possibly inefficient maintenance of separate proceedings in different forums. By its terms, the Act leaves no room for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed. The Act's legislative history establishes that its principal purpose was to ensure judicial enforcement of privately made arbitration agreements, and not to promote the expeditious resolution of claims. By compelling arbitration of state-law claims, a district court successfully protects the parties' contractual rights and their rights under the Arbitration Act. Pp. 216–221.

(b) Neither a stay of arbitration proceedings nor joined proceedings is necessary to protect the federal interest in the federal-court proceeding. The formulation of collateral-estoppel rules affords adequate protection to that interest. Pp. 221–223.

726 F. 2d 552, reversed and remanded.

MARSHALL, J., delivered the opinion for a unanimous Court. WHITE, J., filed a concurring opinion, *post*, p. 224.

Eugene W. Bell argued the cause for petitioner. With him on the briefs was *Kevin K. Fitzgerald.*

Eric V. Benham argued the cause and filed a brief for respondent.*

JUSTICE MARSHALL delivered the opinion of the Court.

The question presented is whether, when a complaint raises both federal securities claims and pendent state claims, a Federal District Court may deny a motion to compel arbitration of the state-law claims despite the parties' agreement to arbitrate their disputes. We granted certiorari to resolve a conflict among the Federal Courts of Appeals on this question. 467 U. S. 1240 (1984).

I

In 1981, A. Lamar Byrd sold his dental practice and invested $160,000 in securities through Dean Witter Reynolds Inc., a securities broker-dealer. The value of the account declined by more than $100,000 between September 1981 and March 1982. Byrd filed a complaint against Dean Witter in the United States District Court for the Southern District of California, alleging a violation of §§ 10(b), 15(c), and 20 of the Securities Exchange Act of 1934, 15 U. S. C. §§ 78j(b), 78o(c), and 78t, and of various state-law provisions. Federal jurisdiction over the state-law claims was based on diversity of citizenship and the principle of pendent jurisdiction. In the complaint, Byrd alleged that an agent of Dean Witter had traded in his account without his prior consent, that the number of transactions executed on behalf of the account was excessive, that misrepresentations were made by an agent of Dean Witter as to the status of the account, and that the agent acted with Dean Witter's knowledge, participation, and ratification.

**Joseph G. Riemer III* and *William J. Fitzpatrick* filed a brief for the Securities Industry Association, Inc., et al. as *amici curiae* urging reversal.

When Byrd invested his funds with Dean Witter in 1981, he signed a Customer's Agreement providing that "[a]ny controversy between you and the undersigned arising out of or relating to this contract or the breach thereof, shall be settled by arbitration." App. to Pet. for Cert. 11. Dean Witter accordingly filed a motion for an order severing the pendent state claims, compelling their arbitration, and staying arbitration of those claims pending resolution of the federal-court action. App. 12. It argued that the Federal Arbitration Act (Arbitration Act or Act), 9 U. S. C. §§1–14, which provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract," §2, required that the District Court compel arbitration of the state-law claims. The Act authorizes parties to an arbitration agreement to petition a federal district court for an order compelling arbitration of any issue referable to arbitration under the agreement. §§3, 4. Because Dean Witter assumed that the federal securities claim was not subject to the arbitration provision of the contract and could be resolved only in the federal forum, it did not seek to compel arbitration of that claim.[1] The District Court denied in its entirety the motion to sever and compel arbitration of the pendent state claims, and on an interlocutory appeal the Court of Appeals for the Ninth Circuit affirmed. 726 F. 2d 552 (1984).

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[1] In *Wilko* v. *Swan*, 346 U. S. 427 (1953), this Court held that a predispute agreement to arbitrate claims that arise under § 12(2) of the Securities Act of 1933, 15 U. S. C. § 77*l*(2), was not enforceable. The Court pointed to language in § 14 of the Securities Act of 1933, 15 U. S. C. § 77n, which declares "void" any "stipulation" waiving compliance with any "provision" of the Securities Act, and held that an agreement to arbitrate amounted to a stipulation waiving the right to seek a judicial remedy, and was therefore void. 346 U. S., at 434–435. Years later, in *Scherk* v. *Alberto-Culver Co.*, 417 U. S. 506 (1974), this Court questioned the applicability of *Wilko* to a claim arising under § 10(b) of the Securities Exchange Act of 1934, or under Rule 10b–5, because the provisions of the 1933 and 1934 Acts differ, and because, unlike § 12(2) of the 1933 Act, § 10(b) of the 1934 Act does not expressly give rise to a private cause of action. 417 U. S., at 512–513. The Court did not, however, hold that *Wilko* would not apply in the context of a § 10(b) or Rule 10b–5 claim, and *Wilko* has retained considerable vitality in the lower federal

II

Confronted with the issue we address[2]—whether to compel arbitration of pendent state-law claims when the federal court will in any event assert jurisdiction over a federal-law claim—the Federal Courts of Appeals have adopted two different approaches. Along with the Ninth Circuit in this case, the Fifth and Eleventh Circuits have relied on the "doctrine of intertwining." When arbitrable and nonarbitrable claims arise out of the same transaction, and are sufficiently intertwined factually and legally, the district court, under this view, may in its discretion deny arbitration as to the arbitrable claims and try all the claims together in federal

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courts. Indeed, numerous District Courts and Courts of Appeals have held that the *Wilko* analysis applies to claims arising under § 10(b) of the Securities Exchange Act of 1934, 15 U. S. C. § 78j(b), and that agreements to arbitrate such claims are therefore unenforceable. See, *e. g.*, *DeLancie* v. *Birr, Wilson & Co.*, 648 F. 2d 1255, 1258–1259 (CA9 1981); *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Moore*, 590 F. 2d 823, 827–829 (CA10 1978); *Weissbuch* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 558 F. 2d 831, 833–835 (CA7 1977); *Sibley* v. *Tandy Corp.*, 543 F. 2d 540, 543, and n. 3 (CA5 1976), cert. denied, 434 U. S. 824 (1977); see also Brief for Petitioner 4, n. 3 (citing cases); Brief for Securities Industry Association, Inc., et al. as *Amici Curiae* 10, n. 7 (same).

Dean Witter and *amici* representing the securities industry urge us to resolve the applicability of *Wilko* to claims under § 10(b) and Rule 10b–5. We decline to do so. In the District Court, Dean Witter did not seek to compel arbitration of the federal securities claims. Thus, the question whether *Wilko* applies to § 10(b) and Rule 10b–5 claims is not properly before us.

[2] Respondent Byrd also argues that as a contract of adhesion this arbitration agreement is subject to close judicial scrutiny, and that it should not routinely be enforced. Byrd did not present this argument to the courts below, and we decline to address it in the first instance. We therefore express no view on the merits of the argument.

court.[3] These courts acknowledge the strong federal policy in favor of enforcing arbitration agreements but offer two reasons why the district courts nevertheless should decline to compel arbitration in this situation. First, they assert that such a result is necessary to preserve what they consider to be the court's exclusive jurisdiction over the federal securities claim; otherwise, they suggest, arbitration of an "intertwined" state claim might precede the federal proceeding and the factfinding done by the arbitrator might thereby bind the federal court through collateral estoppel. The second reason they cite is efficiency; by declining to compel arbitration, the court avoids bifurcated proceedings and perhaps redundant efforts to litigate the same factual questions twice.

In contrast, the Sixth, Seventh, and Eighth Circuits have held that the Arbitration Act divests the district courts of any discretion regarding arbitration in cases containing both arbitrable and nonarbitrable claims, and instead requires that the courts compel arbitration of arbitrable claims, when asked to do so. These courts conclude that the Act, both through its plain meaning and the strong federal policy it reflects, requires courts to enforce the bargain of the parties to arbitrate, and "not substitute [its] own views of economy and efficiency" for those of Congress. *Dickinson* v. *Heinold Securities, Inc.*, 661 F. 2d 638, 646 (CA7 1981).[4]

We agree with these latter courts that the Arbitration Act requires district courts to compel arbitration of pendent arbitrable claims when one of the parties files a motion to compel, even where the result would be the possibly inefficient maintenance of separate proceedings in different forums. Accordingly, we reverse the decision not to compel arbitration.

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[3] See *Belke* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 693 F. 2d 1023 (CA11 1982); *Miley* v. *Oppenheimer & Co.*, 637 F. 2d 318, 334–337 (CA5 1981); see also *Cunningham* v. *Dean Witter Reynolds, Inc.*, 550 F. Supp. 578 (ED Cal. 1982).

[4] See also *Surman* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 733 F. 2d 59 (CA8 1984); *Liskey* v. *Oppenheimer & Co.*, 717 F. 2d 314 (CA6 1983).

III

The Arbitration Act provides that written agreements to arbitrate controversies arising out of an existing contract "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U. S. C. § 2. By its terms, the Act leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed. §§ 3, 4. Thus, insofar as the language of the Act guides our disposition of this case, we would conclude that agreements to arbitrate must be enforced, absent a ground for revocation of the contractual agreement.

It is suggested, however, that the Act does not expressly address whether the same mandate—to enforce arbitration agreements—holds true where, as here, such a course would result in bifurcated proceedings if the arbitration agreement is enforced.[5] Because the Act's drafters did not explicitly consider the prospect of bifurcated proceedings, we are told, the clear language of the Act might be misleading. Thus, courts that have adopted the view of the Ninth Circuit in this case have argued that the Act's goal of speedy and efficient decisionmaking is thwarted by bifurcated proceedings, and that, given the absence of clear direction on this point, the intent of Congress in passing the Act controls and compels a refusal to compel arbitration. They point out, in addition, that in the past the Court on occasion has identified a contrary federal interest sufficiently compelling to outweigh the mandate of the Arbitration Act, see n. 1, *supra*, and they conclude that the interest in speedy resolution of claims should do so in this case. See, *e. g.*, *Miley* v. *Oppenheimer & Co.*, 637 F. 2d 318, 336 (CA5 1981); *Cunningham* v. *Dean Witter Reynolds, Inc.*, 550 F. Supp. 578, 585 (ED Cal. 1982).

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[5] Bifurcated proceedings might be the result in several kinds of cases involving securities transactions. For example, since this Court's decision in *Wilko* v. *Swan*, see n. 1, *supra*, claims arising under § 12(2) of the Securities Act of 1933 may not be resolved through arbitration, and when a court is confronted with a § 12(2) claim, pendent state claims, and a motion to compel arbitration, bifurcated proceedings might result. If *Wilko* applies to claims arising under other provisions of the Securities Acts, the same situation would arise. Also, when as here a federal securities claim and pendent state-law claims are filed and a party to the arbitration agreement asks only that the district court compel arbitration only of the pendent state claims, the prospect of a bifurcated proceeding arises.

Finally, federal courts have addressed the same issue when confronted with federal antitrust actions and pendent state claims. See, *e. g.*, *Lee* v. *Ply*Gem Industries, Inc.*, 193 U. S. App. D. C. 112, 121, 593 F. 2d 1266, 1274–1275, and n. 67 (holding that arbitrable claims should not become "subject to adjudication in court merely because they are related to non-arbitrable claims," when the dispute arises out of a contract containing an agreement to arbitrate), cert. denied, 441 U. S. 967 (1979).

We turn, then, to consider whether the legislative history of the Act provides guidance on this issue. The congressional history does not expressly direct resolution of the scenario we address. We conclude, however, on consideration of Congress' intent in passing the statute, that a court must compel arbitration of otherwise arbitrable claims, when a motion to compel arbitration is made.

The legislative history of the Act establishes that the purpose behind its passage was to ensure judicial enforcement of privately made agreements to arbitrate. We therefore reject the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims. The Act, after all, does not mandate the arbitration of all claims, but merely the enforcement—upon the motion of one of the parties—of privately negotiated arbitration agreements. The House Report accompanying the Act makes clear that its purpose was to place an arbitration agreement "upon the same footing as other contracts, where it belongs," H. R. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924), and to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate.[6] This is not to say that Congress was blind to the potential benefit of the legislation for expedited resolution of disputes. Far from it, the House Report expressly observed:

> "It is practically appropriate that the action should be taken at this time when there is so much agitation against the costliness and delays of litigation. These matters can be largely eliminated by agreements for arbitration, if arbitration agreements are made valid and enforceable." *Id.*, at 2.

Nonetheless, passage of the Act was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered,[7] and we must not overlook this principal objective when construing the statute, or allow the fortuitous impact of the Act on efficient dispute resolution to overshadow the underlying motivation. Indeed, this conclusion is compelled by the Court's recent holding in *Moses H. Cone Memorial Hospital* v. *Mercury Construction*

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[6] According to the Report:

"The need for the law arises from an anachronism of our American law. Some centuries ago, because of the jealousy of the English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction. This jealousy survived for so long a period that the principle became firmly embedded in the English common law and was adopted with it by the American courts. The courts have felt that the precedent was too strongly fixed to be overturned without legislative enactment, although they have frequently criticised the rule and recognized its illogical nature and the injustice which results from it. This bill declares simply that such agreements for arbitration shall be enforced, and provides a procedure in the Federal courts for their enforcement." H. R. Rep. No. 96, 68th Cong., 1st Sess., 1–2 (1924).

See also Cohn & Dayton, The New Federal Arbitration Act, 12 Va. L. Rev. 265, 283–284 (1926).

[7] See also 65 Cong. Rec. 1931 (1924) ("It creates no new legislation, grants no new rights, except a remedy to enforce an agreement in commercial contracts and in admiralty contracts").

Corp., 460 U. S. 1 (1983), in which we affirmed an order requiring enforcement of an arbitration agreement, even though the arbitration would result in bifurcated proceedings. That misfortune, we noted, "occurs because the relevant federal law *requires* piecemeal resolution when necessary to give effect to an arbitration agreement," *id.*, at 20. See also *id.*, at 24–25 ("The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration").

We therefore are not persuaded by the argument that the conflict between two goals of the Arbitration Act—enforcement of private agreements and encouragement of efficient and speedy dispute resolution—must be resolved in favor of the latter in order to realize the intent of the drafters. The preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate, even if the result is "piecemeal" litigation, at least absent a countervailing policy manifested in another federal statute. See n. 1, *supra*. By compelling arbitration of state-law claims, a district court successfully protects the contractual rights of the parties and their rights under the Arbitration Act.

IV

It is also suggested, however, and some Courts of Appeals have held, that district courts should decide arbitrable pendent claims when a nonarbitrable federal claim is before them, because otherwise the findings in the arbitration proceeding might have collateral-estoppel effect in a subsequent federal proceeding. This preclusive effect is believed to pose a threat to the federal interest in resolution of securities claims, and to warrant a refusal to compel arbitration.[8]

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[8] See, *e. g.*, *Belke* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 693 F. 2d, at 1026; *Miley* v. *Oppenheimer & Co.*, 637 F. 2d, at 336; *Cunningham* v. *Dean Witter Reynolds, Inc.*, 550 F. Supp., at 582.

Other courts have held that the claims should be separately resolved, but that this preclusive effect warrants a stay of arbitration proceedings pending resolution of the federal securities claim.[9] In this case, Dean Witter also asked the District Court to stay the arbitration proceedings pending resolution of the federal claim, and we suspect it did so in response to such holdings.

We believe that the preclusive effect of arbitration proceedings is significantly less well settled than the lower court opinions might suggest, and that the consequence of this misconception has been the formulation of unnecessarily contorted procedures. We conclude that neither a stay of proceedings, nor joined proceedings, is necessary to protect the federal interest in the federal-court proceeding, and that the formulation of collateral-estoppel rules affords adequate protection to that interest.

Initially, it is far from certain that arbitration proceedings will have any preclusive effect on the litigation of nonarbitrable federal claims. Just last Term, we held that neither the full-faith-and-credit provision of 28 U. S. C. § 1738, nor a judicially fashioned rule of preclusion, permits a federal court to accord res judicata or collateral-estoppel effect to an unappealed arbitration award in a case brought under 42 U. S. C. § 1983. *McDonald* v. *West Branch*, 466 U. S. 284 (1984). The full-faith-and-credit statute requires that federal courts give the same preclusive effect to a State's *judicial proceedings* as would the courts of the State rendering the judgment, and since arbitration is not a judicial proceeding, we held that the statute does not apply to arbitration awards. *Id.*, at 287–288. The same analysis inevitably would apply to any unappealed state arbitration proceedings. We also declined, in *McDonald*, to fashion a federal common-law rule of preclusion, in part on the ground that arbitration cannot provide an adequate substitute for a judicial proceeding in protecting the federal statutory and constitutional rights that § 1983 is designed to safeguard. We therefore recognized that arbitration proceedings will not necessarily have a preclusive effect on subsequent federal-court proceedings.

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[9] See, *e. g.*, *Surman* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 733 F. 2d, at 62–63; *Dickinson* v. *Heinold Securities, Inc.*, 661 F. 2d 638, 644 (CA7 1981); see also *Liskey* v. *Oppenheimer & Co.*, 717 F. 2d, at 318 (discussing *Dickinson*).

Significantly, *McDonald* also establishes that courts may directly and effectively protect federal interests by determining the preclusive effect to be given to an arbitration proceeding. Since preclusion doctrine comfortably plays this role, it follows that neither a stay of the arbitration proceedings, nor a refusal to compel arbitration of state claims, is *required* in order to assure that a precedent arbitration does not impede a subsequent federal-court action. The Courts of Appeals that have assumed collateral-estoppel effect must be given to arbitration proceedings have therefore sought to accomplish indirectly that which they erroneously assumed they could not do directly.

The question of what preclusive effect, if any, the arbitration proceedings might have is not yet before us, however, and we do not decide it. The collateral-estoppel effect of an arbitration proceeding is at issue only after arbitration is completed, of course, and we therefore have no need to consider now whether the analysis in *McDonald* encompasses this case. Suffice it to say that in framing preclusion rules in this context, courts shall take into account the federal interests warranting protection. As a result, there is no reason to require that district courts decline to compel arbitration, or manipulate the ordering of the resulting bifurcated proceedings, simply to avoid an infringement of federal interests.

Finding unpersuasive the arguments advanced in support of the ruling below, we hold that the District Court erred in refusing to grant the motion of Dean Witter to compel arbitration of the pendent state claims. Accordingly, we reverse the decision of the Court of Appeals insofar as it upheld the District Court's denial of the motion to compel arbitration, and we remand for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE WHITE, concurring.

I join the Court's opinion. I write separately only to add a few words regarding two issues that it leaves undeveloped.

The premise of the controversy before us is that respondent's claims under the Securities Exchange Act of 1934 are not arbitrable, notwithstanding the contrary agreement of the parties. The Court's opinion rightly concludes that the question whether that is so is not before us. *Ante*, at 216, n. 1. Nonetheless, I note that this is a matter of substantial doubt. In *Wilko* v. *Swan*, 346 U. S. 427 (1953), the Court held arbitration agreements unenforceable with regard to claims under § 12(2) of the 1933 Act. It relied on three interconnected statutory provisions: § 14 of the Act, which voids any "stipulation . . . binding any person acquiring any security to waive compliance with any provision" of the Act; § 12(2), which, the Court noted, creates "a special right to recover for misrepresentation which differs substantially from the common-law action"; and § 22, which allows suit in any state or federal court of competent jurisdiction and provides for nationwide service of process. 346 U. S., at 431, 434–435; 15 U. S. C. §§ 77n, 77*l*(2), 77v.

Wilko's reasoning cannot be mechanically transplanted to the 1934 Act. While § 29 of that Act, 15 U. S. C. § 78cc(a), is equivalent to § 14 of the 1933 Act, counterparts of the other two provisions are imperfect or absent altogether. Jurisdiction under the 1934 Act is narrower, being restricted to the federal courts. 15 U. S. C. § 78aa. More important, the cause of action under § 10(b) and Rule 10b–5, involved here, is implied rather than express. See *Herman & MacLean* v. *Huddleston*, 459 U. S. 375, 380, and nn. 9, 10 (1983). The phrase "waive compliance with any *provision of this chapter*," 15 U. S. C. § 78cc(a) (emphasis added), is thus literally inapplicable. Moreover, *Wilko*'s solicitude for the federal cause of action—the "special right" established by Congress, 346 U. S., at 431—is not necessarily appropriate where the cause of action is judicially implied and not so different from the common-law action.*

The Court has expressed these reservations before. *Scherk* v. *Alberto-Culver Co.*, 417 U. S. 506, 513–514 (1974). I reiterate them to emphasize that the question remains open, and the contrary holdings of the lower courts must be viewed with some doubt.

The Court's opinion makes clear that a district court should not stay arbitration, or refuse to compel it at all, for fear of its preclusive effect. And I can perceive few, if any, other possible reasons for staying the arbitration pending the outcome of the lawsuit. Belated enforcement of the arbitration clause, though a less substantial interference than a refusal to enforce it at all, nonetheless significantly disappoints the expectations of the parties and frustrates the clear purpose of their agreement. In addition, once it is decided that the two proceedings are to go forward independently, the concern for speedy resolution suggests that neither should be delayed. While the impossibility of the lawyers being in two places at once may require some accommodation in scheduling, it seems to me that the heavy presumption should be that the arbitration and the lawsuit will each proceed in its normal course. And while the matter remains to be determined by the District Court, I see nothing in the record before us to indicate that arbitration in the present case should be stayed.

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*The 1934 Act does explicitly provide a private right of action to victims of certain illegal conduct. See §§ 9, 16, 18, 15 U. S. C. §§ 78i, 78p, 78r. None of those sections is relied on by respondent.

COUNTY OF ONEIDA, NEW YORK, ET AL. *v.* ONEIDA INDIAN NATION OF NEW YORK STATE ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 83-1065. Argued October 1, 1984—Decided March 4, 1985*

Respondent Indian Tribes (hereafter respondents) brought an action in Federal District Court against petitioner counties (hereafter petitioners), alleging that respondents' ancestors conveyed tribal land to New York State under a 1795 agreement that violated the Nonintercourse Act of 1793—which provided that no person or entity could purchase Indian land without the Federal Government's approval—and that thus the transaction was void. Respondents sought damages representing the fair rental value, for a specified 2-year period, of that part of the land presently occupied by petitioners. The District Court found petitioners liable for wrongful possession of the land in violation of the 1793 Act, awarded respondents damages, and held that New York, a third-party defendant brought into the case by petitioners' cross-claim, must indemnify petitioners for the damages owed to respondents. The Court of Appeals affirmed the liability and indemnification rulings, but remanded for further proceedings on the amount of damages.

Held:

1. Respondents have a federal common-law right of action for violation of their possessory rights. Pp. 233–240.

(a) The possessory rights claimed by respondents are federal rights to the lands at issue. *Oneida Indian Nation* v. *County of Oneida*, 414 U. S. 661, 671. It has been implicitly assumed that Indians have a federal common-law right to sue to enforce their aboriginal land rights, and their right of occupancy need not be based on a treaty, statute, or other Government action. Pp. 233–236.

(b) Respondents' federal common-law right of action was not pre-empted by the Nonintercourse Acts. In determining whether a federal statute pre-empts common-law causes of action, the relevant inquiry is whether the statute speaks directly to the question otherwise answered by federal common law. Here, the 1793 Act did not speak directly to the question of remedies for unlawful conveyances of Indian land, and there is no indication in the legislative history that Congress intended to pre-empt common-law remedies. *Milwaukee* v. *Illinois*,

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*Together with No. 83-1240, *New York* v. *Oneida Indian Nation of New York State et al.*, also on certiorari to the same court.

451 U. S. 304, distinguished. And Congress' actions subsequent to the 1793 Act and later versions thereof demonstrate that the Acts did not pre-empt common-law remedies. Pp. 236–240.

2. There is no merit to any of petitioners' alleged defenses. Pp. 240–250.

(a) Where, as here, there is no controlling federal limitations period, the general rule is that a state limitations period for an analogous cause of action will be borrowed and applied to the federal action, provided that application of the state statute would not be inconsistent with underlying federal policies. In this litigation, the borrowing of a state limitations period would be inconsistent with the federal policy against the application of state statutes of limitations in the context of Indian claims. Pp. 240–244.

(b) This Court will not reach the issue of whether respondents' claims are barred by laches, where the defense was unsuccessfully asserted at trial but not reasserted on appeal and thus not ruled upon by the Court of Appeals. Pp. 244–245.

(c) Respondents' cause of action did not abate when the 1793 Act expired. That Act merely codified the principle that a sovereign act was required to extinguish aboriginal title and thus that a conveyance without the sovereign's consent was void *ab initio*. All subsequent versions of the Act contain substantially the same restraint on alienation of Indian lands. Pp. 245–246.

(d) In view of the principles that treaties with Indians should be construed liberally in favor of the Indians, and that congressional intent to extinguish Indian title must be plain and unambiguous and will not be lightly implied, the 1798 and 1802 Treaties in which respondents ceded additional land to New York are not sufficient to show that the United States ratified New York's unlawful purchase of the land in question. Pp. 246–248.

(e) Nor are respondents' claims barred by the political question doctrine. Congress' constitutional authority over Indian affairs does not render the claims nonjusticiable, and, *a fortiori*, Congress' delegation of authority to the President does not do so either. Nor have petitioners shown any convincing reasons for thinking that there is a need for "unquestioning adherence" to the Commissioner of Indian Affairs' declining to bring an action on respondents' behalf with respect to the claims in question. Pp. 248–250.

3. The courts below erred in exercising ancillary jurisdiction over petitioners' cross-claim for indemnity by the State. The cross-claim raises a question of state law, and there is no evidence that the State has waived its constitutional immunity under the Eleventh Amendment to suit in federal court on this question. Pp. 250–253.

719 F. 2d 525, affirmed in part, reversed in part, and remanded.

POWELL, J., delivered the opinion of the Court, in which BLACKMUN and O'CONNOR, JJ., joined, in all but Part V of which BRENNAN and MARSHALL, JJ., joined, and in Part V of which BURGER, C. J., and WHITE and REHNQUIST, JJ., joined. BRENNAN, J., filed an opinion concurring in part and dissenting in part, in which MARSHALL, J., joined, *post*, p. 254. STEVENS, J., filed a separate statement concurring in the judgment in part, *post*, p. 254, and an opinion dissenting in part, in which BURGER, C. J., and WHITE and REHNQUIST, JJ., joined, *post*, p. 255.

Allan van Gestel argued the cause for petitioners in No. 83–1065. With him on the briefs was *Jeffrey C. Bates*. Messrs. van Gestel and Bates also filed a brief for respondents County of Oneida et al. in No. 83–1240. *Peter H. Schiff*, Deputy Solicitor General of New York, argued the cause for petitioner in No. 83–1240. With him on the briefs were *Robert Abrams*, Attorney General, *Robert Hermann*, Solicitor General, and *Lew A. Millenbach*, Assistant Attorney General.

Arlinda Locklear argued the cause for respondents Oneida Indian Nation et al. in both cases. With her on the brief for respondents Oneida Indian Nation of Wisconsin et al. were *Richard Dauphinais*, *Francis Skenandore*, *Norman Dorsen*, and *Bertram Hirsch*. *Robert T. Coulter* filed a brief for respondent Oneida of the Thames Band Council.

Edwin S. Kneedler argued the cause for the United States as *amicus curiae* in support of the judgment below. With him on the brief were *Solicitor General Lee*, *Assistant Attorney General Habicht*, *Deputy Solicitor General Claiborne*, *Jacques B. Gelin*, and *Arthur E. Gowran*.†

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†Briefs of *amici curiae* urging reversal were filed for C. H. Albright et al. by *J. D. Todd, Jr.*, *Dan M. Byrd, Jr.*, *John C. Christie, Jr.*, *J. William Hayton*, *Stephen J. Landes*, and *Lucinda O. McConathy;* for the City of Escondido et al. by *John R. Schell*, *Kent H. Foster*, *Paul D. Engstrand*, and *Donald R. Lincoln;* and for the County of Seneca, New York, et al. by *James D. St. Clair*, *William F. Lee*, *David Millon*, and *James L. Quarles III*.

Briefs of *amici curiae* urging affirmance were filed for the American Land Title Association by *William T. Finley, Jr.;* and for the Association

JUSTICE POWELL delivered the opinion of the Court.*

These cases present the question whether three Tribes of the Oneida Indians may bring a suit for damages for the occupation and use of tribal land allegedly conveyed unlawfully in 1795.

I

The Oneida Indian Nation of New York, the Oneida Indian Nation of Wisconsin, and the Oneida of the Thames Band Council (the Oneidas) instituted this suit in 1970 against the Counties of Oneida and Madison, New York. The Oneidas alleged that their ancestors conveyed 100,000 acres to the State of New York under a 1795 agreement that violated the Trade and Intercourse Act of 1793 (Nonintercourse Act), 1 Stat. 329, and thus that the transaction was void. The Oneidas' complaint sought damages representing the fair rental value of that part of the land presently owned and occupied by the Counties of Oneida and Madison, for the period January 1, 1968, through December 31, 1969.

The United States District Court for the Northern District of New York initially dismissed the action on the ground that the complaint failed to state a claim arising under the laws of the United States. The United States Court of Appeals for the Second Circuit affirmed. *Oneida Indian Nation* v. *County of Oneida*, 464 F. 2d 916 (1972). We then granted certiorari and reversed. *Oneida Indian Nation* v. *County of Oneida*, 414 U. S. 661 (1974) *(Oneida I)*. We held unanimously that, at least for jurisdictional purposes, the Oneidas stated a claim for possession under federal law. *Id.*, at 675. The case was remanded for trial.

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on American Indian Affairs, Inc., et al. by *Arthur Lazarus, Jr.*, and *Jerry C. Straus*.

Richard K. Hughes filed a brief for the County of Franklin, New York, et al. as *amici curiae*.

*THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE REHNQUIST join only Part V of this opinion.

On remand, the District Court trifurcated trial of the issues. In the first phase, the court found the counties liable to the Oneidas for wrongful possession of their lands. 434 F. Supp. 527 (1977). In the second phase, it awarded the Oneidas damages in the amount of $16,694, plus interest, representing the fair rental value of the land in question for the 2-year period specified in the complaint. Finally, the District Court held that the State of New York, a third-party defendant brought into the case by the counties, must indemnify the counties for the damages owed to the Oneidas. The Court of Appeals affirmed the trial court's rulings with respect to liability and indemnification. 719 F. 2d 525 (1983). It remanded, however, for further proceedings on the amount of damages. *Id.*, at 542. The counties and the State petitioned for review of these rulings. Recognizing the importance of the Court of Appeals' decision not only for the Oneidas, but potentially for many eastern Indian land claims, we granted certiorari, 465 U. S. 1099 (1984), to determine whether an Indian tribe may have a live cause of action for a violation of its possessory rights that occurred 175 years ago. We hold that the Court of Appeals correctly so ruled.

II

The respondents in these cases are the direct descendants of members of the Oneida Indian Nation, one of the six nations of the Iroquois, the most powerful Indian Tribe in the Northeast at the time of the American Revolution. See B. Graymont, The Iroquois in the American Revolution (1972) (hereinafter Graymont). From time immemorial to shortly after the Revolution, the Oneidas inhabited what is now central New York State. Their aboriginal land was approximately six million acres, extending from the Pennsylvania border to the St. Lawrence River, from the shores of Lake Ontario to the western foothills of the Adirondack Mountains. See 434 F. Supp., at 533.

Although most of the Iroquois sided with the British, the Oneidas actively supported the colonists in the Revolution. *Ibid.;* see also Graymont, *supra.* This assistance prevented the Iroquois from asserting a united effort against the colonists, and thus the Oneidas' support was of considerable aid. After the War, the United States recognized the importance of the Oneidas' role, and in the Treaty of Fort Stanwix, 7 Stat. 15 (Oct. 22, 1784), the National Government promised that the Oneidas would be secure "in the possession of the lands on which they are settled." Within a short period of time, the United States twice reaffirmed this promise, in the Treaties of Fort Harmar, 7 Stat. 33 (Jan. 9, 1789), and of Canandaigua, 7 Stat. 44 (Nov. 11, 1794).[1]

During this period, the State of New York came under increasingly heavy pressure to open the Oneidas' land for settlement. Consequently, in 1788, the State entered into a "treaty" with the Indians, in which it purchased the vast majority of the Oneidas' land. The Oneidas retained a reservation of about 300,000 acres, an area that, the parties stipulated below, included the land involved in this suit.

In 1790, at the urging of President Washington and Secretary of War Knox, Congress passed the first Indian Trade and Intercourse Act, ch. 33, 1 Stat. 137. See 4 American State Papers, Indian Affairs, Vol. 1, p. 53 (1832); F. Prucha, American Indian Policy in the Formative Years 43–44 (1962). The Act prohibited the conveyance of Indian land except where such conveyances were entered pursuant to the treaty power of the United States.[2] In 1793, Congress passed a stronger, more detailed version of the Act, providing that "no purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into pursuant to the constitution . . . [and] in the presence, and with the approbation of the commissioner or commissioners of the United States" appointed to supervise such transactions. 1 Stat. 330, § 8. Unlike the 1790 version, the new statute included criminal penalties for violation of its terms. *Ibid.*

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[1] The Treaty of Fort Harmar stated that the Oneidas and the Tuscaroras were "again secured and confirmed in the possession of their respective lands." 7 Stat. 34. The Treaty of Canandaigua of 1794 provided: "The United States acknowledge the lands reserved to the Oneida, Onondaga and Cayuga Nations, in their respective treaties with the state of New-York, and called their reservations, to be their property; and the United States will never claim the same, nor disturb them . . . in the free use and enjoyment thereof: but the said reservations shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase." 7 Stat. 45.

Despite Congress' clear policy that no person or entity should purchase Indian land without the acquiescence of the Federal Government, in 1795 the State of New York began negotiations to buy the remainder of the Oneidas' land. When this fact came to the attention of Secretary of War Pickering, he warned Governor Clinton, and later Governor Jay, that New York was required by the Nonintercourse Act to request the appointment of federal commissioners to supervise any land transaction with the Oneidas. See 434 F. Supp., at 534–535. The State ignored these warnings, and in the summer of 1795 entered into an agreement with the Oneidas whereby they conveyed virtually all of their remaining land to the State for annual cash payments. *Ibid.* It is this transaction that is the basis of the Oneidas' complaint in this case.

The District Court found that the 1795 conveyance did not comply with the requirements of the Nonintercourse

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[2] Section 4 of the 1790 Act declared that "no sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state, whether having the right of pre-emption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States." 1 Stat. 138.

Act. *Id.*, at 538–541. In particular, the court stated that "[t]he only finding permitted by the record . . . is that no United States Commissioner or other official of the federal government was present at the . . . transaction." *Id.*, at 535. The petitioners did not dispute this finding on appeal. Rather, they argued that the Oneidas did not have a federal common-law cause of action for this violation. Even if such an action once existed, they contended that the Nonintercourse Act pre-empted it, and that the Oneidas could not maintain a private cause of action for violations of the Act. Additionally, they maintained that any such cause of action was time-barred or nonjusticiable, that any cause of action under the 1793 Act had abated, and that the United States had ratified the conveyance. The Court of Appeals, with one judge dissenting, rejected these arguments. Petitioners renew these claims here; we also reject them and affirm the court's finding of liability.

III

At the outset, we are faced with petitioner counties' contention that the Oneidas have no right of action for the violation of the 1793 Act. Both the District Court and the Court of Appeals rejected this claim, finding that the Oneidas had the right to sue on two theories: first, a common-law right of action for unlawful possession; and second, an implied statutory cause of action under the Nonintercourse Act of 1793. We need not reach the latter question as we think the Indians' common-law right to sue is firmly established.

A

Federal Common Law

By the time of the Revolutionary War, several well-defined principles had been established governing the nature of a tribe's interest in its property and how those interests could be conveyed. It was accepted that Indian nations held "aboriginal title" to lands they had inhabited from time immemorial. See Cohen, Original Indian Title, 32 Minn. L. Rev. 28 (1947). The "doctrine of discovery" provided, however, that discovering nations held fee title to these lands, subject to the Indians' right of occupancy and use. As a consequence, no one could purchase Indian land or otherwise terminate aboriginal title without the consent of the sovereign.[3] *Oneida I*, 414 U. S., at 667. See Clinton & Hotopp, Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims, 31 Me. L. Rev. 17, 19–49 (1979).

With the adoption of the Constitution, Indian relations became the exclusive province of federal law. *Oneida I*, *supra*, at 670 (citing *Worcester* v. *Georgia*, 6 Pet. 515, 561 (1832)).[4] From the first Indian claims presented, this Court recognized the aboriginal rights of the Indians to their lands. The Court spoke of the "unquestioned right" of the Indians to the exclusive possession of their lands, *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 17 (1831), and stated that the Indians' right of occupancy is "as sacred as the fee simple of the whites." *Mitchel* v. *United States*, 9 Pet. 711, 746 (1835). This principle has been reaffirmed consistently. See also *Fletcher* v. *Peck*, 6 Cranch 87, 142–143 (1810); *Johnson* v. *McIntosh*, 8 Wheat. 543 (1823); *Clark* v. *Smith*, 13 Pet. 195, 201 (1839); *Lattimer* v. *Poteet*, 14 Pet. 4 (1840); *Chouteau* v. *Molony*, 16 How. 203 (1854); *Holden* v. *Joy*, 17 Wall. 211 (1872). Thus, as we concluded in *Oneida I*, "the possessory right claimed [by the Oneidas] is a *federal* right to the lands at issue in this case." 414 U. S., at 671 (emphasis in original).

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[3] This Court explained the doctrine of discovery as follows:

"[D]iscovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.

"The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. . . .

"The rights thus acquired being exclusive, no other power could interpose between [the discoverer and the natives].

"In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it." *Johnson* v. *McIntosh*, 8 Wheat. 543, 573–574 (1823).

[4] Madison cited the National Government's inability to control trade with the Indians as one of the key deficiencies of the Articles of Confederation, and urged adoption of the Indian Commerce Clause, Art. 1, § 8,

Numerous decisions of this Court prior to *Oneida I* recognized at least implicitly that Indians have a federal common-law right to sue to enforce their aboriginal land rights.[5] In *Johnson* v. *McIntosh*, *supra*, the Court declared invalid two private purchases of Indian land that occurred in 1773 and 1775 without the Crown's consent. Subsequently in *Marsh* v. *Brooks*, 8 How. 223, 232 (1850), it was held: "That an action of ejectment could be maintained on an Indian right to occupancy and use, is not open to question. This is the result of the decision in Johnson v. McIntosh." More recently, the Court held that Indians have a common-law right of action for an accounting of "all rents, issues and

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cl. 3, that granted Congress the power to regulate trade with the Indians. The Federalist No. 42, p. 284 (J. Cooke, ed. 1961). See also Clinton & Hotopp, Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims, 31 Me. L. Rev. 17, 23–29 (1979).

[5] Petitioners argue that *Jaeger* v. *United States*, 27 Ct. Cl. 278 (1892), holds that tribes can sue only when specifically authorized to do so by Congress. *Jaeger* is clearly inapposite to this case. It applied only to the special jurisdiction of the Court of Claims and to claims against the United States.

profits" against trespassers on their land. *United States* v. *Santa Fe Pacific R. Co.*, 314 U. S. 339 (1941).[6] Finally, the Court's opinion in *Oneida I* implicitly assumed that the Oneidas could bring a common-law action to vindicate their aboriginal rights. Citing *United States* v. *Santa Fe Pacific R. Co.*, *supra*, at 347, we noted that the Indians' right of occupancy need not be based on treaty, statute, or other formal Government action. 414 U. S., at 668–669. We stated that "absent federal statutory guidance, the governing rule of decision would be fashioned by the federal court in the mode of the common law." *Id.*, at 674 (citing *United States* v. *Forness*, 125 F. 2d 928 (CA2), cert. denied *sub nom. City of Salamanca* v. *United States*, 316 U. S. 694 (1942)).

In keeping with these well-established principles, we hold that the Oneidas can maintain this action for violation of their possessory rights based on federal common law.

B

Pre-emption

Petitioners argue that the Nonintercourse Acts pre-empted whatever right of action the Oneidas may have had at common law, relying on our decisions in *Milwaukee* v. *Illinois*, 451 U. S. 304 (1981) *(Milwaukee II)*, and *Middlesex County Sewerage Authority* v. *National Sea Clammers Assn.*, 453 U. S. 1 (1981). We find this view to be unpersuasive. In determining whether a federal statute pre-empts common-law causes of action, the relevant inquiry is whether the statute "[speaks] *directly* to [the] question" otherwise answered by federal common law. *Milwaukee II*, *supra*, at 315 (emphasis added). As we stated in *Milwaukee II*, federal common law is used as a "necessary expedient" when Congress has not "spoken to a *particular* issue." 451 U. S., at 313–314 (emphasis added). The Nonintercourse Act of 1793 does not speak directly to the question of remedies for unlawful conveyances of Indian land. A comparison of the 1793 Act and the statute at issue in *Milwaukee II* is instructive.

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[6] See also *Fellows* v. *Blacksmith*, 19 How. 366 (1857) (upholding trespass action on Indian land); *Inupiat Community of the Arctic Slope* v. *United States*, 230 Ct. Cl. 647, 656–657, 680 F. 2d 122, 128–129 (right to sue for trespass is one of rights of Indian title), cert. denied, 459 U. S. 969 (1982); *United States* v. *Southern Pacific Transportation Co.*, 543 F. 2d 676 (CA9 1976) (damages available against railroad that failed to acquire lawful easement or right-of-way over Indian reservation); *Edwardsen* v. *Morton*, 369 F. Supp. 1359, 1371 (DC 1973) (upholding trespass action based on aboriginal title).

Milwaukee II raised the question whether a common-law action for the abatement of a nuisance caused by the pollution of interstate waterways survived the passage of the 1972 amendments to the Federal Water Pollution Control Act, Pub. L. 92–500, 86 Stat. 816 (FWPCA).[7] FWPCA established an elaborate system for dealing with the problem of interstate water pollution, providing for enforcement of its terms by agency action and citizens suits. See *Milwaukee II*, *supra*, at 325–327. It also made available civil penalties for violations of the Act. 33 U. S. C. §§1319(d), 1365. The legislative history indicated that Congress intended FWPCA to provide a comprehensive solution to the problem of interstate water pollution, as we noted in *Milwaukee II*, *supra*, at 317–319.

In contrast, the Nonintercourse Act of 1793 did not establish a comprehensive remedial plan for dealing with violations of Indian property rights. There is no indication in the legislative history that Congress intended to pre-empt common-law remedies.[8] Only two sections of the Act, §§5 and 8, involve Indian lands at all.[9] The relevant clause of § 8 provides simply that "no purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into pursuant to the constitution . . . ." 1 Stat. 330. It contains no remedial provision.[10] Section 5 subjects individuals who settle on Indian lands to a fine and imprisonment, and gives the President discretionary authority to remove illegal settlers from the Indians' land.[11]

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[7] Previously, in *Illinois* v. *City of Milwaukee*, 406 U. S. 91 (1972), the Court had held that federal common law provided a cause of action for the abatement of interstate water pollution.

[8] There is some contemporaneous evidence to the contrary. President Washington, at whose urging the first Acts were passed, met with Cornplanter, Chief of the Seneca Nation, shortly after the enactment of the 1790 Act. They discussed the Senecas' complaints about land transactions, and

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Washington assured them that the new statute would protect their interests. Washington told Cornplanter:

"Here, then, is the security for the remainder of your lands. No State, nor person, can purchase your lands, unless at some public treaty, held under the authority of the United States. . . .

. . . . .

"If . . . you have any just cause of complaint against [a purchaser] and can make satisfactory proof thereof, the federal courts will be open to you for redress, as to all other persons." 4 American State Papers, Indian Affairs, Vol. 1, p. 142 (1832).

[9] The Act contained 15 sections. A number of these set out licensing requirements for those who wished to trade with the Indians (§§ 1,2,3). Several others established special requirements for purchasing horses from Indians (§§ 6,7). Others gave the United States courts jurisdiction over offenses under the Act (§§ 10,11) and provided for the division of fines and forfeitures (§ 12). 1 Stat. 329–333.

[10] The second clause of § 8 makes it a criminal offense to negotiate a treaty or convention for the conveyance of Indian land, except under the authority and in the presence of United States commissioners. 1 Stat. 330. It likewise makes no provision to restore illegally purchased land to the Indians.

Petitioners make much of the fact that the 1793 Act contained criminal penalties in arguing that the Act pre-empted common-law actions. In property law, however, it is common to have criminal and civil sanctions available for infringement of property rights, and for government officials to use the police power to remove trespassers from privately owned land. See 5 R. Powell, Real Property ¶ 758 (1984).

[11] The Act authorizes the President "to take such measures, as he may judge necessary, to remove from lands belonging to any Indian tribe, any citizens or inhabitants of the United States, who have made, or shall

Thus, the Nonintercourse Act does not address directly the problem of restoring unlawfully conveyed land to the Indians, in contrast to the specific remedial provisions contained in FWPCA. See *Milwaukee II*, 451 U. S., at 313–315.

Significantly, Congress' action subsequent to the enactment of the 1793 statute and later versions of the Nonintercourse Act demonstrate that the Acts did not pre-empt common-law remedies. In 1822 Congress amended the 1802 version of the Act to provide that "in all trials about the right of property, in which Indians shall be party on one side and white persons on the other, the burden of proof shall rest upon the white person, in every case in which the Indian shall make out a presumption of title in himself from the fact of previous possession and ownership." § 4, 3 Stat. 683; see 25 U. S. C. § 194. Thus, Congress apparently contemplated suits by Indians asserting their property rights.

Decisions of this Court also contradict petitioners' argument for pre-emption. Most recently, in *Wilson* v. *Omaha Indian Tribe*, 442 U. S. 653 (1979), the Omaha Indian Tribe sued to quiet title on land that had surfaced over the years as the Missouri River changed its course. The Omahas based their claim for possession on aboriginal title. The Court construed the 1822 amendment to apply to suits brought by Indian tribes as well as individual Indians. Citing the very sections of the Act that petitioners contend pre-empt a common-law action by the Indians, the Court interpreted the amendment to be part of the overall "design" of the Nonintercourse Acts "to protect the rights of Indians to their properties." *Id.*, at 664. See also *Fellows* v. *Blacksmith*, 19 How. 366 (1857).[12]

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hereafter make, or attempt to make a settlement thereon." 1 Stat. 330. It imposes no obligation on the Executive to take remedial action, and apparently was intended only to give the President discretionary authority to preserve the peace.

[12] Similarly, we find no support for petitioners' contention that the availability of suits by the United States on behalf of Indian tribes precludes

We recognized in *Oneida I* that the Nonintercourse Acts simply "put in statutory form what was or came to be the accepted rule—that the extinguishment of Indian title required the consent of the United States." 414 U. S., at 678. Nothing in the statutory formulation of this rule suggests that the Indians' right to pursue common-law remedies was thereby pre-empted. Accordingly, we hold that the Oneidas' right of action under federal common law was not pre-empted by the passage of the Nonintercourse Acts.

IV

Having determined that the Oneidas have a cause of action under federal common law, we address the question whether there are defenses available to the counties. We conclude that none has merit.

A

Statute of Limitations

There is no federal statute of limitations governing federal common-law actions by Indians to enforce property rights. In the absence of a controlling federal limitations period, the general rule is that a state limitations period for an analogous cause of action is borrowed and applied to the federal claim, provided that the application of the state statute would not be inconsistent with underlying federal policies.[13] See

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common-law actions by the tribes themselves. See *Poafpybitty* v. *Skelly Oil Co.*, 390 U. S. 365, 369 (1968); *Creek Nation* v. *United States*, 318 U. S. 629, 640 (1943) (citing *Cherokee Nation* v. *Southern Kansas R. Co.*, 135 U. S. 641 (1890); *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294 (1902); and *Lone Wolf* v. *Hitchcock*, 187 U. S. 553 (1903)). See also *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U. S. 463, 473 (1976) ("[I]t would appear that Congress contemplated that a tribe's access to federal court to litigate a matter arising 'under the Constitution, laws, or treaties' would be at least in some respects as broad as that of the United States suing as the tribe's trustee").

[13] Under the Supremacy Clause, state-law time bars, *e. g.*, adverse possession and laches, do not apply of their own force to Indian land title claims. See *Ewert* v. *Bluejacket*, 259 U. S. 129, 137–138 (1922); *United*

Johnson v. *Railway Express Agency, Inc.*, 421 U. S. 454, 465 (1975). See also *Occidental Life Ins. Co.* v. *EEOC*, 432 U. S. 355, 367 (1977). We think the borrowing of a state limitations period in these cases would be inconsistent with federal policy. Indeed, on a number of occasions Congress has made this clear with respect to Indian land claims.

In adopting the statute that gave jurisdiction over civil actions involving Indians to the New York courts, Congress included this proviso: "[N]othing herein contained shall be construed as conferring jurisdiction on the courts of the State of New York or making applicable the laws of the State of New York in civil actions involving Indian lands or claims with respect thereto which relate to transactions or events transpiring prior to September 13, 1952." 25 U. S. C. § 233. This proviso was added specifically to ensure that the New York statute of limitations would not apply to pre-1952 land claims.[14] In *Oneida I*, we relied on the legislative history of 25 U. S. C. § 233 in concluding that Indian land claims were exclusively a matter of federal law. 414 U. S., at 680–682. This history also reflects congressional policy against the application of state statutes of limitations in the context of Indian land claims.

Congress recently reaffirmed this policy in addressing the question of the appropriate statute of limitations for certain claims brought by the United States on behalf of Indians. Originally enacted in 1966, this statute provided a special limitations period of 6 years and 90 days for contract and tort suits for damages brought by the United States on

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States v. *Ahtanum Irrigation District*, 236 F. 2d 321, 334 (CA9 1956), cert. denied, 352 U. S. 988 (1957).

[14] Representative Morris, the sponsor of the proviso, stated:

"As it is now, the Indians, as we know, are wards of the Government and, therefore, the statute of limitations does not run against them as it does in the ordinary case. This [proviso] will preserve their rights so that the statute will not be running against them concerning those claims that might have arisen before the passage of this act." 96 Cong. Rec. 12460 (1950).

behalf of Indians. 28 U. S. C. §§2415(a), (b). The statute stipulated that claims that accrued prior to its date of enactment, July 18, 1966, were deemed to have accrued on that date. §2415(g). Section 2415(c) excluded from the limitations period all actions "to establish the title to, or right of possession of, real or personal property."

In 1972 and again in 1977, 1980, and 1982, as the statute of limitations was about to expire for pre-1966 claims, Congress extended the time within which the United States could bring suits on behalf of the Indians. The legislative history of the 1972, 1977, and 1980 amendments demonstrates that Congress did not intend §2415 to apply to suits brought by the Indians themselves, and that it assumed that the Indians' right to sue was not otherwise subject to any statute of limitations. Both proponents and opponents of the amendments shared these views. See 123 Cong. Rec. 22167–22168 (1977) (remarks of Rep. Dicks, arguing that extension is unnecessary because the Indians can bring suit even if the statute of limitations expires for the United States); *id.*, at 22166 and 22499 (remarks of Rep. Cohen, arguing that the basic problem with the bill is its failure to limit suits brought by Indians); 126 Cong. Rec. 3289 (1980) (remarks of Sen. Melcher, reiterating with respect to the 1980 extension Rep. Dicks' argument against the 1977 extension); *id.*, at 3290 (remarks of Sen. Cohen, same); Statute of Limitations Extension: Hearing before the Senate Select Committee on Indian Affairs, 96th Cong., 1st Sess., 312–314 (1979); Statute of Limitations Extension for Indian Claims: Hearings on S. 1377 before the Senate Select Committee on Indian Affairs, 95th Cong., 1st Sess., 76–77 (1977); Time Extension for Commencing Actions on Behalf of Indians: Hearing on S. 3377 and H. R. 13825 before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs, 92d Cong., 2d Sess., 23 (1972).

With the enactment of the 1982 amendments, Congress for the first time imposed a statute of limitations on certain tort and contract claims for damages brought by individual Indians and Indian tribes. These amendments, enacted as the Indian Claims Limitation Act of 1982, Pub. L. 97–394, 96 Stat. 1976, note following 28 U. S. C. § 2415, established a system for the final resolution of pre-1966 claims cognizable under §§ 2415(a) and (b). The Act directed the Secretary of the Interior to compile and publish in the Federal Register a list of all Indian claims to which the statute of limitations provided in 28 U. S. C. § 2415 applied. The Act also directed that the Secretary notify those Indians who may have an interest in any such claims. The Indians were then given an opportunity to submit additional claims; these were to be compiled and published on a second list. Actions for claims subject to the limitations periods of § 2415 that appeared on neither list were barred unless commenced within 60 days of the publication of the second list. If at any time the Secretary decides not to pursue a claim on one of the lists, "*any* right of action shall be barred unless the complaint is filed within one year after the date of publication [of the notice of the Secretary's decision] in the Federal Register." Pub. L. 97–394, 96 Stat. 1978, § 5(c) (emphasis added). Thus, § 5(c) implicitly imposed a 1-year statute of limitations within which the Indians must bring contract and tort claims that are covered by §§ 2415(a) and (b) and not listed by the Secretary. So long as a listed claim is neither acted upon nor formally rejected by the Secretary, it remains live.[15]

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[15] The two lists were published in the Federal Register on March 31, 1983, and November 7, 1983, respectively. 48 Fed. Reg. 13698, 51204. The Oneidas' claims are on the first list compiled by the Secretary. *Id.*, at 13920. These claims would not be barred, however, even if they were not listed. The Oneidas commenced this suit in 1970 when no statute of limitations applied to claims brought by the Indians themselves. Additionally, if claims like the Oneidas', *i. e.*, damages actions that involve litigating the continued vitality of aboriginal title, are construed to be suits "to establish the title to, or right of possession of, real or personal property," they would be exempt from the statute of limitations of the Indian Claims Limitations

The legislative history of the successive amendments to § 2415 is replete with evidence of Congress' concern that the United States had failed to live up to its responsibilities as trustee for the Indians, and that the Department of the Interior had not acted with appropriate dispatch in meeting the deadlines provided by § 2415. *E. g.*, Authorizing Indian Tribes to Bring Certain Actions on Behalf of their Members with Respect to Certain Legal Claims, and for Other Purposes, H. R. Rep. No. 97-954, p. 5 (1982). By providing a 1-year limitations period for claims that the Secretary decides not to pursue, Congress intended to give the Indians one last opportunity to file suits covered by § 2415(a) and (b) on their own behalf. Thus, we think the statutory framework adopted in 1982 presumes the existence of an Indian right of action not otherwise subject to any statute of limitations. It would be a violation of Congress' will were we to hold that a state statute of limitations period should be borrowed in these circumstances.

B

Laches

The dissent argues that we should apply the equitable doctrine of laches to hold that the Oneidas' claim is barred. Although it is far from clear that this defense is available in suits such as this one,[16] we do not reach this issue today.

Act of 1982. The Government agrees with this view. Brief for United States as *Amicus Curiae* 24-25.

[16] We note, as JUSTICE STEVENS properly recognizes, that application of the equitable defense of laches in an action at law would be novel indeed. Moreover, the logic of the Court's holding in *Ewert* v. *Bluejacket*, 259 U. S. 129 (1922), seems applicable here: "the equitable doctrine of laches, developed and designed to protect good-faith transactions against those who have slept on their rights, with knowledge and ample opportunity to assert them, cannot properly have application to give vitality to a void deed and to bar the rights of Indian wards in lands subject to statutory restrictions." *Id.*, at 138. Additionally, this Court has indicated that extinguishment of Indian title requires a sovereign act. See, *e. g.*, *Oneida I*, 414 U. S. 661, 670 (1974); *United States* v. *Candelaria*, 271 U. S. 432, 439

While petitioners argued at trial that the Oneidas were guilty of laches, the District Court ruled against them and they did not reassert this defense on appeal. As a result, the Court of Appeals did not rule on this claim, and we likewise decline to do so.

C

Abatement

Petitioners argue that any cause of action for violation of the Nonintercourse Act of 1793 abated when the statute expired. They note that Congress specifically provided that the 1793 Act would be in force "for the term of two years, and from thence to the end of the then next session of Congress, and no longer." 1 Stat. 332, § 15. They contend that the 1796 version of the Nonintercourse Act repealed the 1793 version and enacted an entirely new statute, and that under the common-law abatement doctrine in effect at the time, any cause of action for violation of the statute finally abated on the expiration of the statute.[17] We disagree.

The pertinent provision of the 1793 Act, § 8, like its predecessor, § 4 of the 1790 Act, 1 Stat. 138, merely codified the principle that a sovereign act was required to extinguish aboriginal title and thus that a conveyance without the sovereign's consent was void *ab initio*. See *supra*, at 233–234,

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(1926), quoting *United States* v. *Sandoval*, 231 U. S. 28, 45–47 (1913). In these circumstances, it is questionable whether laches properly could be applied. Furthermore, the statutory restraint on alienation of Indian tribal land adopted by the Nonintercourse Act of 1793 is still the law. See 25 U. S. C. § 177. This fact not only distinguishes the cases relied upon by the dissent, but also suggests that, as with the borrowing of state statutes of limitations, the application of laches would appear to be inconsistent with established federal policy. Although the issue of laches is not before us, we add these observations in response to the dissent.

[17] It is questionable whether the common-law doctrine of abatement is even relevant to the statutory provision at issue in this case. The doctrine principally applies to criminal law, and provides that all prosecutions that have not proceeded to final judgment under a statute that has been repealed or has expired have abated, unless the repealing legislature provides otherwise. See *Warden* v. *Marrero*, 417 U. S. 653, 660 (1974).

and n. 3. All of the subsequent versions of the Nonintercourse Act, including that now in force, 25 U. S. C. § 177, contain substantially the same restraint on the alienation of Indian lands. In these circumstances, the precedents of this Court compel the conclusion that the Oneidas' cause of action has not abated.[18]

D

Ratification

We are similarly unpersuaded by petitioners' contention that the United States has ratified the unlawful 1795 conveyances. Petitioners base this argument on federally approved treaties in 1798 and 1802 in which the Oneidas ceded additional land to the State of New York.[19] There is a question

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[18] The reasoning of *Bear Lake and River Water Works and Irrigation Co.* v. *Garland*, 164 U. S. 1, 11–12 (1896), is directly on point:

"Although there is a formal repeal of the old by the new statute, still there never has been a moment of time since the passage of the [old] act . . . when these similar provisions have not been in force. Notwithstanding, therefore, this formal repeal, it is . . . entirely correct to say that the new act should be construed as a continuation of the old . . . ."

Accord, *Steamship Co*: v. *Joliffe*, 2 Wall. 450, 458 (1865); *Great Northern R. Co.* v. *United States*, 155 F. 945, 948 (CA8 1907), aff'd, 208 U. S. 452 (1908).

[19] The 1798 Treaty provided:

"[T]he said Indians do cede release and quit claim to the people of the State of New York forever all the lands within their reservation to the westward and southwestward of a line from the northeastern corner of lot No. 54 in *the last purchase from them* running northerly to a Button wood tree . . . standing on the bank of the Oneida lake." Treaty of June 1, 1798, reproduced in Ratified Indian Treaties 1722–1869, National Archives Microfilm Publications, Microcopy No. 668 (roll 2) (emphasis added).

The 1802 Treaty provided:

"All that certain tract of land beginning at the southwest corner of the land lying along the Gennesee Road, . . . and running thence along the last mentioned tract easterly to the southeast corner thereof; thence southerly, in the direction of the continuation of the east bounds of said last mentioned tract, to *other lands heretofore ceded* by the said Oneida nation of Indians to the People of the State of New York." Treaty of June 4, 1802, whether the 1802 treaty ever became effective.[20] Assuming it did, neither the 1798 nor the 1802 treaty qualifies as federal ratification of the 1795 conveyance.

The canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians. Thus, it is well established that treaties should be construed liberally in favor of the Indians, *Choctaw Nation* v. *United States*, 318 U. S. 423, 431–432 (1943); *Choate* v. *Trapp*, 224 U. S. 665, 675 (1912), with ambiguous provisions interpreted to their benefit, *McClanahan* v. *Arizona State Tax Comm'n*, 411 U. S. 164, 174 (1973); *Carpenter* v. *Shaw*, 280 U. S. 363, 367 (1930); *Winters* v. *United States*, 207 U. S. 564, 576–577 (1908). "Absent explicit statutory language," *Washington* v. *Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U. S. 658, 690 (1979), this Court accordingly has refused to find that Congress has abrogated Indian treaty rights. *Menominee Tribe* v. *United States*, 391 U. S. 404 (1968). See generally F. Cohen, Handbook of Federal Indian Law 221–225 (1982 ed.) (hereinafter F. Cohen).

The Court has applied similar canons of construction in nontreaty matters. Most importantly, the Court has held that congressional intent to extinguish Indian title must be

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reproduced in 4 American State Papers, Indian Affairs, Vol. 1, p. 664 (1832) (emphasis added).

[20] Although both treaties were approved by the Senate, see 1 Journal of the Executive Proceedings of the Senate of the United States 312 (1828); *id.*, at 428, neither is contained in the compilation of "all Treaties with . . . Indian tribes" compiled at Congress' direction. See J. Res. 10, 5 Stat. 799 (1845). There is evidence that President Adams signed the 1798 Treaty in the February 23, 1799, entry in his Journal of executive actions, March 1797–March 1799 ("Signed a treaty with the Oneida nation"), reproduced in The Adams Family Papers, John Adams, *Misc.* (Lib. Cong. Reel No. 194). Moreover, the 1798 Treaty was included in an 1822 compilation of treaties with the Indians that extinguished Indian title in New York. H. R. Doc. No. 74, 17th Cong., 1st Sess., 8 (1822). There is no similar evidence that the 1802 Treaty was signed by the President.

"plain and unambiguous," *United States* v. *Santa Fe Pacific R. Co.*, 314 U. S., at 346, and will not be "lightly implied," *id.*, at 354. Relying on the strong policy of the United States "from the beginning to respect the Indian right of occupancy," *id.*, at 345 (citing *Cramer* v. *United States*, 261 U. S. 219, 227 (1923)), the Court concluded that it "[c]ertainly" would require "plain and unambiguous action to deprive the [Indians] of the benefits of that policy," 314 U. S., at 346. See F. Cohen.

In view of these principles, the treaties relied upon by petitioners are not sufficient to show that the United States ratified New York's unlawful purchase of the Oneidas' land. The language cited by petitioners, a reference in the 1798 treaty to "the last purchase" and one in the 1802 treaty to "land heretofore ceded," far from demonstrates a plain and unambiguous intent to extinguish Indian title. See n. 19, *supra*. There is no indication that either the Senate or the President intended by these references to ratify the 1795 conveyance. See 1 Journal of the Executive Proceedings of the Senate 273, 312, 408, 428 (1828).[21]

E

Nonjusticiability

The claim also is made that the issue presented by the Oneidas' action is a nonjusticiable political question. The counties contend first that Art. 1, §8, cl. 3, of the Constitution explicitly commits responsibility for Indian affairs to Congress.[22] Moreover, they argue that Congress has given exclusive civil remedial authority to the Executive for cases such as this one, citing the Nonintercourse Acts and the 1794 Treaty of Canandaigua.[23] Thus, they say this case falls within the political question doctrine because of "a textually demonstrable constitutional commitment of the issue to a coordinate political department." *Baker* v. *Carr*, 369 U. S. 186, 217 (1962). Additionally, the counties argue that the question is nonjusticiable because there is "an unusual need for unquestioning adherence to a political decision already made." *Ibid.* None of these claims is meritorious.

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[21] The cases relied upon by petitioners likewise do not support a finding of ratification here. *Rosebud Sioux Tribe* v. *Kneip*, 430 U. S. 584 (1977), expressly reaffirmed the principles of construction which we apply in this case. Petitioners' other cases, *e. g.*, *FPC* v. *Tuscarora Indian Nation*, 362 U. S. 99 (1960), and *Shoshone Tribe* v. *United States*, 299 U. S. 476 (1937), do so implicitly.

[22] "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

This Court has held specifically that Congress' plenary power in Indian affairs under Art. 1, § 8, cl. 3, does not mean that litigation involving such matters necessarily entails nonjusticiable political questions. *Delaware Tribal Business Committee* v. *Weeks*, 430 U. S. 73, 83–84 (1977). Accord, *United States* v. *Sioux Nation*, 448 U. S. 371, 413 (1980). See also *Baker* v. *Carr*, *supra*, at 215–217. If Congress' constitutional authority over Indian affairs does not render the Oneidas' claim nonjusticiable, *a fortiori*, Congress' delegation of authority to the President does not do so either.[24]

We are also unpersuaded that petitioners have shown "an unusual need for unquestioning adherence to a political decision already made." *Baker* v. *Carr*, *supra*, at 217.

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[23] The counties rely on the language in the Treaty providing that "complaint shall be made by . . . the Six Nations or any of them, to the President of the United States, or the Superintendant by him appointed . . . and such prudent measures shall then be pursued as shall be necessary to preserve our peace and friendship unbroken; until the legislature . . . of the United States shall make other equitable provision for the purpose." Art. VII, Treaty of Canandaigua, Nov. 11, 1794, 7 Stat. 46.

[24] Moreover, Congress' delegation to the President is not a "textually demonstrable *constitutional* commitment," *Baker* v. *Carr*, 369 U. S., at 217 (emphasis added), but rather a statutory commitment of authority. We have held today that the Nonintercourse Acts do not pre-empt common-law causes of action by Indian tribes to enforce their property rights. The language in the Treaty of Canandaigua, see n. 23, *supra*, is likewise an insufficient basis on which to find that the Oneidas' federal common-law right of action has been pre-empted. Thus, the predicate of petitioners' argument, that Congress has delegated exclusive civil remedial authority to the President, must fail.

The basis for their argument is the fact that in 1968, the Commissioner of Indian Affairs declined to bring an action on behalf of the Oneidas with respect to the claims asserted in these cases. The counties cite no cases in which analogous decisions provided the basis for nonjusticiability. Cf. *INS* v. *Chadha*, 462 U. S. 919 (1983); *United States* v. *Nixon*, 418 U. S. 683 (1974); *Powell* v. *McCormack*, 395 U. S. 486 (1969). Our cases suggest that such "unusual need" arises most of the time, if not always, in the area of foreign affairs. *Baker* v. *Carr*, *supra*, at 211–213; see also *Gilligan* v. *Morgan*, 413 U. S. 1 (1973). Nor do the counties offer convincing reasons for thinking that there is a need for "unquestioning adherence" to the Commissioner's decision. Indeed, the fact that the Secretary of the Interior has listed the Oneidas' claims under the § 2415 procedure suggests that the Commissioner's 1968 decision was not a decision on the merits of the Oneidas' claims. See n. 15, *supra*.[25]

We conclude, therefore, that the Oneidas' claim is not barred by the political question doctrine.

V

Finally, we face the question whether the Court of Appeals correctly held that the federal courts could exercise ancillary jurisdiction over the counties' cross-claim against the State of New York for indemnification. The counties assert that this claim arises under both state and federal law. The Court of Appeals did not decide whether it was based on state or federal law. See 719 F. 2d, at 542–544. It held, however, that the 1790 and 1793 Nonintercourse Acts "placed New York on notice that Congress had exercised its power to regulate commerce with the Indians. Thus, anything New York thereafter did with respect to Indian lands carried with it a waiver of the State's eleventh amendment immunity." *Id.*, at 543 (citing *Edelman* v. *Jordan*, 415 U. S. 651, 672 (1974), and *Employees* v. *Missouri Dept. of Public Health and Welfare*, 411 U. S. 279, 283–284 (1973)). In essence, the Court of Appeals held that by violating a federal statute, the State consented to suit in federal court by any party on any claim, state or federal, growing out of the same nucleus of operative facts as the statutory violation. This proposition has no basis in law.

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[25] We note that the Commissioner's decision was based on the fact that the same claims were then pending before the Indian Claims Commission. The Oneidas have since withdrawn their claims from the Indian Claims Commission.

The counties' cross-claim for indemnification raises a classic example of ancillary jurisdiction. See *Owen Equipment & Erection Co.* v. *Kroger*, 437 U. S. 365 (1978). The Eleventh Amendment forecloses, however, the application of normal principles of ancillary and pendent jurisdiction where claims are pressed against the State. *Pennhurst State School and Hospital* v. *Halderman*, 465 U. S. 89 (1984). As we held in *Pennhurst:* "[N]either pendent jurisdiction nor any other basis of jurisdiction may override the Eleventh Amendment. A federal court must examine each claim in a case to see if the court's jurisdiction over that claim is barred by the Eleventh Amendment." *Id.*, at 121. The indemnification claim here, whether cast as a question of New York law or federal common law, is a claim against the State for retroactive monetary relief. In the absence of the State's consent, *id.*, at 99 (citing *Clark* v. *Barnard*, 108 U. S. 436, 447 (1883)), the suit is barred by the Eleventh Amendment. Thus, as the Court of Appeals recognized, whether the State has consented to waive its constitutional immunity is the critical factor in whether the federal courts properly exercised ancillary jurisdiction over the counties' claim for indemnification. *Pennhurst, supra.*

The only ground the Court of Appeals and the counties offer for believing that the State has consented to suit in federal court on this claim is the fact that it violated the 1793 Nonintercourse Act by purchasing the Oneidas' land.

The counties assert that because the Constitution specifically authorizes Congress "[t]o regulate Commerce . . . with the Indian Tribes," the States necessarily consented to suit in federal court with respect to enactments under this Clause. See *County of Monroe* v. *Florida*, 678 F. 2d 1124 (CA2 1982) (making an analogous argument with respect to Congress' extradition power), cert. denied, 459 U. S. 1104 (1983); *Mills Music, Inc.* v. *Arizona*, 591 F. 2d 1278, 1285 (CA9 1979) (making such an argument with respect to Congress' power over copyright and patents). Thus, they contend, Congress can abrogate the States' Eleventh Amendment immunity and has done so by enacting the Nonintercourse Acts. By violating the 1793 Act, the State thus waived its immunity to suit in federal court with respect to such violations.

Assuming, without deciding, that this reasoning is correct, it does not address the Eleventh Amendment problem here, for the counties' indemnification claim against the State does not arise under the 1793 Act. The counties cite no authority for their contrary view. They urge simply that the State would be unjustly enriched if the counties were forced to pay the Oneidas without indemnity from the State, and thus that the Court should "fashion a remedy" for the counties under the 1793 Act. This is an argument on the merits; it is not an argument that the indemnification claim arises under the Act. As we said in *Pennhurst*, "[a] State's constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued." 465 U. S., at 99 (emphasis in original). The Eleventh Amendment bar does not vary with the merits of the claims pressed against the State.

We conclude, therefore, that the counties' cross-claim for indemnity by the State raises a question of state law. We are referred to no evidence that the State has waived its constitutional immunity to suit in federal court on this question.[26]

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[26] Three cases establish our approach to the test of waiver of the Eleventh Amendment. *Edelman* v. *Jordan*, 415 U. S. 651 (1974); *Employees* v. *Missouri Dept. of Public Health and Welfare*, 411 U. S. 279 (1973); and

Thus, under *Pennhurst*, we hold that the federal courts erred in exercising ancillary jurisdiction over this claim.

VI

The decisions of this Court emphasize "Congress' unique obligation toward the Indians." *Morton* v. *Mancari*, 417 U. S. 535, 555 (1974). The Government, in an *amicus curiae* brief, urged the Court to affirm the Court of Appeals. Brief for United States as *Amicus Curiae* 28. The Government recognized, as we do, the potential consequences of affirmance. It was observed, however, that "Congress has enacted legislation to extinguish Indian title and claims related thereto in other eastern States, . . . and it could be expected to do the same in New York should the occasion arise." *Id.*, at 29–30. See Rhode Island Indian Claims Settlement Act, 25 U. S. C. § 1701 *et seq.;* Maine Indian Claims Settlement Act, 25 U. S. C. § 1721 *et seq.* We agree that this litigation makes abundantly clear the necessity for congressional action.

One would have thought that claims dating back for more than a century and a half would have been barred long ago. As our opinion indicates, however, neither petitioners nor we have found any applicable statute of limitations or other relevant legal basis for holding that the Oneidas' claims are barred or otherwise have been satisfied. The judgment of the Court of Appeals is affirmed with respect to the finding of liability under federal common law,[27] and reversed with respect to the exercise of ancillary jurisdiction over the

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Parden v. *Terminal R. Co.*, 377 U. S. 184 (1964). Although each of these involved waiver for purposes of suit under a federal statute, we indicated in *Pennhurst* that the same standards apply in the context of a state statute. 465 U. S., at 99–100.

[27] The question whether equitable considerations should limit the relief available to the present day Oneida Indians was not addressed by the Court of Appeals or presented to this Court by petitioners. Accordingly, we express no opinion as to whether other considerations may be relevant to the final disposition of this case should Congress not exercise its authority to resolve these far-reaching Indian claims.

counties' cross-claim for indemnification. The cases are remanded to the Court of Appeals for further proceedings consistent with our decision.

It is so ordered.

JUSTICE STEVENS concurs in the judgment with respect to No. 83-1240.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, concurring in part and dissenting in part.

I join the Court's opinion except for Part V. I dissent from Part V because I adhere to my view that the Eleventh Amendment "bars federal court suits against States only by citizens of other States," *Yeomans* v. *Kentucky*, 423 U. S. 983, 984 (1975) (BRENNAN, J., dissenting). Thus, I would hold that the State of New York is not entitled to invoke the protections of that Amendment in this federal-court suit by counties of New York. See *Employees* v. *Missouri Dept. of Public Health and Welfare*, 411 U. S. 279, 298 (1973) (BRENNAN, J., dissenting); *Edelman* v. *Jordan*, 415 U. S. 651, 687 (1974) (BRENNAN, J., dissenting). In my view, *Hans* v. *Louisiana*, 134 U. S. 1 (1890), erects a limited constitutional barrier prohibiting suits against States by citizens of another State; the decision, however, "accords to nonconsenting States only a *nonconstitutional* immunity from suit by its own citizens." *Employees* v. *Missouri Dept. of Public Health and Welfare, supra*, at 313 (BRENNAN, J., dissenting) (emphasis added). For scholarly discussion supporting this view, see Shapiro, Wrong Turns: The Eleventh Amendment and the *Pennhurst* Case, 98 Harv. L. Rev. 61, 68 (1984); Gibbons, The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation, 83 Colum. L. Rev. 1889, 1893-1894 (1983); Field, The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One, 126 U. Pa. L. Rev. 515, 538-540, and n. 88 (1978).

JUSTICE STEVENS, with whom THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE REHNQUIST join, dissenting in No. 83–1065.

In 1790, the President of the United States notified Cornplanter, the Chief of the Senecas, that federal law would securely protect Seneca lands from acquisition by any State or person:

> "If . . . you have any just cause of complaint against [a purchaser] and can make satisfactory proof thereof, the federal courts will be open to you for redress, as to all other persons." 4 American State Papers, Indian Affairs, Vol. 1, p. 142 (1832).[1]

The elders of the Oneida Indian Nation received comparable notice of their capacity to maintain the federal claim that is at issue in this litigation.[2] They made no attempt to assert the claim, and their successors in interest waited 175 years before bringing suit to avoid a 1795 conveyance that the Tribe freely made, for a valuable consideration. The absence of any evidence of deception, concealment, or interference with the Tribe's right to assert a claim, together with the societal interests that always underlie statutes of repose—particularly when title to real property is at stake—convince me that this claim is barred by the extraordinary passage of time. It is worthy of emphasis that this claim arose when George Washington was the President of the United States.

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[1] Before 1875 when "Congress conferred upon the lower federal courts, for but the second time in their nearly century-old history, general federal-question jurisdiction," *Steffel* v. *Thompson*, 415 U. S. 452, 464 (1974); Judiciary Act of March 3, 1875, 18 Stat. 470, an Indian tribe could only raise its federal land claims in this Court by appealing a state-court judgment, Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 85. Until Congress made Indians United States citizens in the Act of June 2, 1924, ch. 233, 43 Stat. 253, they were not generally considered "citizens" for the purposes of diversity jurisdiction in the lower federal courts. Nor were the tribes "foreign states" entitled to apply for original jurisdiction in this Court. *Cherokee Nation* v. *Georgia*, 5 Pet. 1 (1831).

[2] During the negotiations leading to the 1795 treaty with New York, a federal agent informed the Tribe that no local treaty could validly transfer their interest in lands without the presence of a United States Indian Commissioner, Record Doc. No. 37, p. 122.

The Court refuses to apply any time bar to this claim, believing that to do so would be inconsistent with federal Indian policy. This Court, however, has always applied the equitable doctrine of laches when Indians or others have sought, in equity, to set aside conveyances made under a statutory or common-law incapacity to convey. Although this action is brought at law, in ejectment, there are sound reasons for recognizing that it is barred by similar principles.

In reaching a contrary conclusion, the Court relies on the legislative histories of a series of recent enactments. In my view, however, the Oneida were barred from avoiding their 1795 conveyance long before 1952, when Congress enacted the first statute that the Court relies on today. Neither that statute, nor any subsequent federal legislation, revived the Oneida's dormant claim.

I

Today's decision is an unprecedented departure from the wisdom of the common law:

> "The best interests of society require that causes of action should not be deferred an unreasonable time. This remark is peculiarly applicable to land titles. Nothing so much retards the growth and prosperity of a country as insecurity of titles to real estate. Labor is paralysed where the enjoyment of its fruits is uncertain; and litigation without limit produces ruinous consequences to individuals." *Lewis* v. *Marshall*, 5 Pet. 470, 477–478 (1831).

Of course, as the Court notes, there "is no federal statute of limitations governing federal common-law actions by Indians to enforce property rights." *Ante*, at 240. However, "where Congress has not spoken but left matters for judicial determination within the general framework of familiar legal principles," *Holmberg* v. *Armbrecht*, 327 U. S. 392, 395 (1946), the settled practice has been to adopt the state law of limitations as federal law.

The Court has recognized that "State legislatures do not devise their limitations periods with national interests in mind, and it is the duty of the federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies." *Occidental Life Ins. Co.* v. *EEOC*, 432 U. S. 355, 367 (1977). The Court, for example, has refused to apply state laws of limitations when a more analogous federal statute of limitations better reflects the appropriate balance between the enforcement of federal substantive policies and the historic principles of repose,[3] or when a unique federal interest in the subject matter or a paramount interest in national uniformity require the fashioning of a federal time bar in order to avoid serious conflict with federal policies or functions.[4] In applying these principles, however, the Court has always presumed that *some* principle of limitation applies to federal causes of action.[5] Thus, in *Occidental Life Ins. Co.*, the Court concluded that Congress had intended no rigid time limit for EEOC enforcement actions, but the Court also recognized that federal courts have adequate power to bar an action if the defendant was "significantly handicapped in making his defense because of an inordinate EEOC delay." *Id.*, at 373.

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[3] *DelCostello* v. *Teamsters*, 462 U. S. 151 (1983); cf. *McAllister* v. *Magnolia Petroleum Co.*, 357 U. S. 221 (1958).

[4] *Holmberg* v. *Armbrecht*, 327 U. S. 392, 395 (1946) ("We have the duty of federal courts, sitting as national courts throughout the country, to apply their own principles in enforcing an equitable right created by Congress").

[5] In cases arising in admiralty, the Court has traditionally applied the equitable doctrine of laches. See, *e. g.*, *Gutierrez* v. *Waterman S.S. Corp.*, 373 U. S. 206, 215 (1963). In territorial disputes arising under our original jurisdiction we have applied the doctrine of acquiescence which confirms the legal validity of a boundary line accepted for a considerable length of time by all parties as the actual boundary between two States, notwithstanding any irregularities in its legal origin. See *California* v. *Nevada*, 447 U. S. 125, 130–132 (1980); *Ohio* v. *Kentucky*, 410 U. S. 641, 650–651 (1973). Under the lost grant doctrine, "lapse of time," under carefully limited circumstances, "may cure the neglect or failure to secure the proper muniments of title," even against the United States. *United States* v. *Fullard-Leo*, 331 U. S. 256, 270 (1947).

Before 1966 there was no federal statute of limitations that even arguably could have supplanted a state limitation. Even the longest possibly applicable state statute of limitations would surely have barred this cause of action—which arose in 1795—many years before 1966.[6] Moreover, "[a] state statute cannot be considered 'inconsistent' with federal law merely because the statute causes the plaintiff to lose the litigation." *Robertson* v. *Wegmann*, 436 U. S. 584, 593 (1978). Nor is the rejection of a generally applicable state law inappropriate merely because one party is an Indian tribe and the subject matter of the litigation involves tribal property. *Wilson* v. *Omaha Indian Tribe*, 442 U. S. 653, 673–674 (1979). Thus, a routine application of our practice in dealing with limitations questions would lead to the conclusion that this claim is barred by the lapse of time.

Nevertheless, there are unique considerations in cases involving Indian claims that warrant a departure from the ordinary practice. Indians have long occupied a protected status in our law, and in the 19th century they were often characterized as wards of the State.[7] At common law, conveyances of persons subject to similar disabilities were void. In practice, however, the common-law courts modified the wooden rules ordinarily applied to real property claims in actions at law in order to protect the ward, as far as possible, from manipulation, while at the same time avoiding the obvious inequity involved in the setting aside, at a distant date, of conveyances that had been freely made, for valuable consideration.

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[6] While the current New York period of limitations applicable to actions "to recover real property or its possession" presently is 10 years, N. Y. Civ. Prac. Law. § 212 (McKinney 1972), the period in 1795 was 50 years, 1788 N. Y. Laws, ch. 43, p. 685.

[7] See *Felix* v. *Patrick*, 145 U. S. 317, 330 (1892) ("Whatever may have been the injustice visited upon this unfortunate race of people by their white neighbors, this court has repeatedly held them to be the wards of the nation, entitled to a special protection in its courts, and as persons 'in a state of pupilage'"); *Chouteau* v. *Molony*, 16 How. 203, 237–238 (1854) (Under Spanish law, "Indians, although of age, continue to enjoy the rights of minors, to avoid contracts or other sales of their property—particularly

For example, the statute of limitations applicable to actions seeking to gain recovery of the real estate conveyed under such disabilities did not begin to run against a ward until his unique disabilities had been overcome.[8] Thus, to be faithful to these common-law principles, the application of a state statute of limitations in the context of ancient Indian claims would require flexible consideration of the development of the particular tribe's capacity to govern its own affairs.

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real—made without authority of the judiciary or the intervention of their legal protectors. Indians are considered as persons under legal disability . . .") (citation omitted); *Georgia & the Treaty of Indian Spring*, 2 Op. Atty. Gen. 110, 133 (1828) (Although under federal law Indians have a limited capacity to contract for the sale of their lands, "[a] limited capacity to contract is no anomaly in the law. Infants have this limited capacity to contract . . . ; beyond this limit, their contracts are void. . . . Yet it was never imagined that, because their independence or competency was not absolute and universal, but limited, that therefore their contracts *within the sphere of their competency* were to be differently construed from those of other persons"); see also *ante*, at 241, n. 14 (opinion of the Court); *United States* v. *Kagama*, 118 U. S. 375, 383–384 (1886); *Cherokee Nation* v. *Georgia*, 5 Pet., at 17.

[8] See 2 W. Blackstone, Commentaries *291–*292; 2 J. Kent, Commentaries on American Law 248–249 (8th ed. 1854); 5 G. Thompson, Real Property § 2556 (1979); 6 G. Thompson, Real Property § 2947 (1962); cf. *Schrimpscher* v. *Stockton*, 183 U. S. 290, 296 (1902) ("Conceding, but without deciding, that so long as Indians maintain their tribal relations they are not chargeable with laches or failure to assert their claims within the time prescribed by statutes, . . . they would lose this immunity when their relations with their tribe were dissolved by accepting allotments of lands in severalty").

Moreover, the common law developed prescription doctrines that terminated the vendor's power to avoid a void conveyance in an action in ejectment. These doctrines could deny the ward, or those claiming under him, a cause of action in ejectment even before the running of the applicable statute of limitations. Although these doctrines were often based on theories of implied ratification, they were most often enforced in circumstances indicating undue or prejudicial delay.[9]

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[9] In *Brazee* v. *Schofield*, 124 U. S. 495 (1888), the Court rejected the claim in ejectment of a person seeking to avoid a conveyance made by a minor during his infancy:

"For eleven years after [the minor] became of age he made no objection to the proceedings, or by any act indicated his intention to disaffirm the sale or deed . . . ; and [only then] he gave to the grantors of the [plaintiffs] a deed of his interest in the . . . claim. In the meantime, the property had greatly increased in value by the improvements put upon it by the purchaser . . . . Under these circumstances, . . . the long acquiescence of the minor, after he became of age, in the proceedings had for the sale of his property, was equivalent to an express affirmance of them, even were they affected with such irregularities as, upon his prompt application after becoming of age, would have justified the court in setting them aside." *Id.*, at 504–505.

See also *Irvine* v. *Irvine*, 9 Wall. 617 (1870); *Tucker* v. *Moreland*, 10 Pet. 58 (1836). See generally 1 L. Jones, Real Property §§ 24–26 (1896); 1 J. Kent, Commentaries on American Law 252–255 (8th ed. 1854); 1 R. Powell, Real Property ¶ 125, p. 483 (1984); 6 G. Thompson, Real Property § 2946, pp. 30–31; § 2951, pp. 63–64 (1962); cf. 2 J. Pomeroy, Equity Jurisprudence § 965 (1886).

Similar doctrines have been applied in the Indian area. For example, in *United States* v. *Santa Fe Pacific R. Co.*, 314 U. S. 339 (1941), the Court held that the acceptance by the Walapais Indians of reservation lands "must be regarded in law as the equivalent of a release of any tribal rights which they may have had in lands outside the reservation. They were in substance acquiescing in the penetration of white settlers on condition that permanent provision was made for them too. In view of this historical setting, it cannot now be fairly implied that tribal rights of the Walapais in lands outside the reservation were preserved. . . . Hence, acquiescence in that arrangement must be deemed to have been a relinquishment of tribal rights in lands outside the reservation and notoriously claimed by others." *Id.*, at 358. See also *Mitchel* v. *United States*, 9 Pet. 711, 746 (1835)

I believe that the equitable doctrine of laches,[10] with its focus on legitimate reliance and inexcusable delay, best reflects the limitation principles that would have governed this ancient claim at common law—without requiring a historian's inquiry into the archaic limitation doctrines that would have governed the claims at any specific time in the preceding two centuries. Of course, the application of a traditional equita-

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("*Indian possession or occupation was considered with reference to their habits and modes of life;* their hunting-grounds were as much in their actual possession as the cleared fields of the whites; and their rights to its exclusive enjoyment in their own way, and for their own purposes were as much respected, *until they abandoned them,* made a cession to the government, or an authorized sale to individuals. *In either case their right became extinct* . . .") (emphasis added); *Williams* v. *City of Chicago,* 242 U. S. 434, 437 (1917) ("If in any view [the Pottawatomie Nation] ever held possession of the property here in question, *we know historically that this was abandoned long ago* and that for more than a half century [the tribe] has not even pretended to occupy either the shores or waters of Lake Michigan within the confines of Illinois") (emphasis added). Cf. H. R. Doc. No. 1590, 63d Cong., 3d Sess., 11 (1915) (The Oneida sold most of their lands to the State, and divided the remaining lands in severalty; "as a tribe these Indians are known no more in that State").

[10] In their petition for certiorari, the counties raised the general question of what federal time bar should apply to this litigation in asking the Court to decide "Whether, in any case, respondent's claim is barred because it was not brought until 175 years after the conveyance." Pet. for Cert. of Counties, Question 2. The possibility that laches might apply to the claim is fairly included within that question. The laches question was fully litigated in the trial court—the testimony of four of the six witnesses appearing on the Oneida's behalf in the liability phase of the trial was presented solely to avoid the obvious defense of laches. Record Doc. No. 37, pp. 196–276. The Court of Appeals' rejection of delay-based defenses, 719 F. 2d 525, 538 (CA2 1983), will remain the law of the Circuit until it is reversed by this Court, and will no doubt apply to the numerous Indian claims pending in the lower courts, see cases cited in Brief for Respondent Counties in No. 83–1240, p. 10, and n. 8. Discussion of the applicability of equitable limitations or laches appears in the briefs, Reply Brief for Petitioner Counties in No. 83–1065, pp. 19–20; Brief for United States as *Amicus Curiae* 33–40; Brief for City of Escondido et al. as *Amici Curiae* 21–29, and occurred at oral argument. Tr. of Oral Arg. 61–65.

ble defense in an action at law is something of a novelty. But this novel development in litigation involving Indian claims arose in order to benefit a special class of litigants, and it remains true that an equitable defense to the instant claim is less harsh than a straightforward application of the limitations rule dictated by our usual practice. At least equal to the maxim that equity follows the law is the truth that common-law real property principles were often tempered by equitable considerations—as the rules limiting a ward's power to avoid an unlawful conveyance demonstrate.[11]

As the Court recognizes, the instant action arises under the federal common law, not under any congressional enactment, and in this context the Court would not risk frustrating the will of the Legislature[12] by applying this familiar doctrine of equity. The merger of law and equity in one federal court[13] is, of course, primarily procedural. Considering the hybrid nature of these claims and the evolving character of the common law, however, I believe that the application of laches as a limitation principle governing ancient Indian claims will promote uniformity of result in law and at equity, maintain the proper measure of flexibility to protect the legitimate interests of the tribes, while at the same time honoring the historic wisdom in the value of repose.

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[11] In fact, the idea that the State should protect persons suffering from disabilities who had no other lawful protector probably arose at equity where the Chancery Courts exercised the prerogatives of the King as *parens patriae*, 3 J. Story, Equity Jurisprudence § 1748 (14th ed. 1918), and applied theories of constructive fraud, 2 J. Pomeroy, Equity Jurisprudence § 943 (1886).

[12] In deference to the doctrine of the separation of powers, the Court has been circumspect in adopting principles of equity in the context of enforcing federal statutes. See generally *Weinberger* v. *Romero-Barcelo*, 456 U. S. 305 (1982); *TVA* v. *Hill*, 437 U. S. 153 (1978); *Hecht Co.* v. *Bowles*, 321 U. S. 321 (1944); Plater, Statutory Violations and Equitable Discretion, 70 Calif. L. Rev. 524, 592 (1982).

[13] *E. g.*, Fed. Rules Civ. Proc. 1, 2.

II

Three decisions of this Court illustrate the application of the doctrine of laches to actions seeking to set aside conveyances made in violation of federal law. In *Ewert* v. *Bluejacket*, 259 U. S. 129 (1922), the Court stated that "the equitable doctrine of laches . . . cannot properly have application to give vitality to a void deed and to bar the rights of Indian wards in lands subject to statutory restrictions." *Id.*, at 138. A close examination of the *Ewert* case, however, indicates that the Court *applied* the doctrine of laches, but rejected relief for the defendant *in the circumstances of the case.*

In 1909, Ewert, a federal Indian agent, obtained a conveyance of allotted lands from the heirs of an Indian in violation of a statutory prohibition against federal officers engaging in trade with Indians. In 1916, the heirs brought an action, in equity, seeking to set aside the conveyance. The Court of Appeals held that the heirs had the burden of disproving laches because they had brought their action outside the applicable state statute of limitations, and concluded that they had not satisfied this burden. "The adult plaintiffs were free to make conveyance of this land, even though they were Indians, and [since] their tribal relations had been severed, [they] were chargeable with the same diligence as white people in discovering and pursuing their legal remedies. [*Felix* v. *Patrick*, 145 U. S. 317 (1892)]; [*Schrimpscher* v. *Stockton*, 183 U. S. 290 (1902)]." *Bluejacket* v. *Ewert*, 265 F. 823, 829 (CA8 1920).

On appeal, this Court held that the plaintiffs' action was not barred by the doctrine of laches, noting that "[Ewert] still holds the legal title to the land." 259 U. S., at 138. The Court principally relied on the doctrine that "an [unlawful] act . . . is void and confers no right *upon the wrongdoer.*" *Waskey* v. *Hammer*, 223 U. S. 85, 94 (1912) (emphasis added). On the facts of *Ewert*, the Court found that the plaintiffs' burden of disproving laches was easily met, but the Court might well have reached a different conclusion in *Ewert* if the conveyance had not been so recent, if the defendant had not been as blameworthy, or if the character of the property had changed dramatically in the interim.

My interpretation of *Ewert* is illustrated by this Court's prior decision in *Felix* v. *Patrick*, 145 U. S. 317 (1892). In that case, the Court applied the doctrine of laches to bar an action by the heirs of an Indian to establish a constructive trust over lands that had been conveyed by her in violation of a federal statutory restriction. The action to set aside the unlawful transfer was brought 28 years after the transaction, and in the intervening time, "[t]hat which was wild land thirty years ago is now intersected by streets, subdivided into blocks and lots, and largely occupied by persons who have bought upon the strength of Patrick's title, and have erected buildings of a permanent character upon their purchases." *Id.*, at 334.

The Court recognized that the long passage of time, the change in the character of the property, the transfer of some of the property to third parties, the absence of any obvious inadequacy in the consideration received in the original transaction, and Patrick's lack of direct participation in the original transfer all supported a charge of laches against the plaintiffs. In addition, the Court noted that "[t]he decree prayed for in this case, if granted, would offer a distinct encouragement to the purchase of similar claims, which doubtless exist in abundance through the Western Territories, . . . and would result in the unsettlement of large numbers of titles upon which the owners have rested in assured security for nearly a generation." *Id.*, at 335.

Nor is *Felix* the only application of these principles in a similar context. In *Wetzel* v. *Minnesota Railway Transfer Co.*, 169 U. S. 237 (1898), the children of a deceased Mexican War veteran received a warrant for 160 acres of land under a federal statute that prohibited any alienation of the property without the approval of the proper state probate court. The children's guardian sold their share in the warrant without seeking the approval of the proper court. Forty-four years after the conveyance, the children brought an action, in equity, seeking to establish a constructive trust over the 160 acres—now located in a well-developed area of St. Paul, Minnesota. The Court held that the action was barred by laches relying on *Felix* v. *Patrick*, and noting that the property had been completely developed and had greatly increased in value. The Court also observed that title had passed to persons who were no doubt ignorant of the defect in title.

The Court also noted the relevance of the length of the delay:

> "While the fact that the complainants were ignorant of the defect in the title and were without means to prosecute an investigation into the facts may properly be considered by the court, it does not mitigate the hardship to the defendants of unsettling these titles. *If the complainant may put forward these excuses for delay after thirty years, there is no reason why they may not allege the same as an excuse after a lapse of sixty. The truth is, there must be some limit of time within which these excuses shall be available, or titles might forever be insecure.* The interests of public order and tranquillity demand that parties shall acquaint themselves with their rights within a reasonable time, and although this time may be extended by their actual ignorance, or want of means, it is by no means illimitable." 169 U. S., at 241 (emphasis added).

Ewert, *Felix*, and *Wetzel* establish beyond doubt that it is quite consistent with federal policy to apply the doctrine of laches to limit a vendor's power to avoid a conveyance violating a federal restriction on alienation.

III

As in *Felix* and *Wetzel*, the land conveyed by the Oneida in 1795 has been converted from wilderness to cities, towns, villages, and farms. The 872 acres of land involved in the instant action include the principal transportation arteries in the region, and other vital public facilities owned by the Counties of Oneida and Madison.[14] The counties and the private property owners affected by the litigation, without proven notice of the defect in title caused by the State of New York's failure to comply with the federal statute, have erected costly improvements on the property in reliance on the validity of their title. Even if the counties are considered for some purposes to be the alter ego of the State, it is surely a fiction to argue that they are in any way responsible for their predicament,[15] or that their taxpayers, who will ultimately bear the burden of the judgment in this case, are in any way culpable for New York's violation of federal law in 1795.

As the Court holds, *ante*, at 233–236, there was no *legal* impediment to the maintenance of this cause of action at any time after 1795. Although the mere passage of time, without other inequity in the prosecution of the claim, does not support a finding of laches in the ordinary case, *e. g.*, *Holmberg* v. *Armbrecht*, 327 U. S., at 396, in cases of *gross* laches the passage of a great length of time creates a nearly insurmountable burden on the plaintiffs to disprove the obvious defense of laches.[16] As Justice Story noted for the Court in *Prevost* v. *Gratz*, 6 Wheat. 481, 504–505 (1821):

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[14] Partial Findings of Fact and Conclusions of Law (Oct. 5, 1981), App. 148a–153a.

[15] *Id.*, at 151a ("The counties of Madison and Oneida, New York, were not in existence in 1795 at the time of the transaction complained of in this action. No evidence has been presented to show that the Counties . . . acted other than in good faith when they came into possession of the County Land in the claim area subsequent to 1795 and prior to January 1, 1968").

[16] See, *e. g.*, *French Republic* v. *Saratoga Vichy Spring Co.*, 191 U. S. 427, 436–437 (1903) (25-year delay); *Clarke* v. *Boorman's Executors*, 18 Wall. 493, 509 (1874) (40-year delay); *Badger* v. *Badger*, 2 Wall. 87, 94–95 (1864) (28-year delay); *Wagner* v. *Baird*, 7 How. 234, 258–259 (1849)

> "[G]eneral presumptions are raised by the law upon subjects of which there is no record or written instrument, not because there are the means of belief or disbelief, but because mankind, judging of matters of antiquity from the infirmity and necessity of their situation must, for the preservation of their property and rights, have recourse to some general principle, to take the place of individual and specific belief, which can hold only as to matters within our own time, upon which a conclusion can be formed from particular and individual knowledge." *Id.*, at 504–505.

Given their burden of explaining nearly two centuries of delay in the prosecution of this claim, and considering the

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(46-year delay); *Bowman* v. *Wathen*, 1 How. 189, 195 (1843) (38-year delay); *Piatt* v. *Vattier*, 9 Pet. 405, 416–417 (1835) (30-year delay); see also 3 J. Story, Commentaries on Equity Jurisprudence 553 (1918) ("Courts of Equity act sometimes by analogy to the law, and sometimes act upon their own inherent doctrine of discouraging for the peace of society antiquated demands by refusing to interfere where there has been gross laches in prosecuting rights, or long and unreasonable acquiescence in the assertion of adverse rights"); cf. *Saratoga Vichy Spring Co.* v. *Lehman*, 625 F. 2d 1037, 1041 (CA2 1980) (69-year delay); *Anheuser-Busch, Inc.* v. *Du Bois Brewing Co.*, 175 F. 2d 370, 374 (CA3 1949) (in hypothetical lapse of 100 years "highly dubious" whether plaintiff could prevail), cert. denied, 339 U. S. 934 (1950).

In deciding territorial disputes arising under this Court's original jurisdiction, similar principles have frequently been applied:

"No human transactions are unaffected by time. Its influence is seen on all things subject to change. And this is peculiarly the case in regard to matters which rest in memory, and which consequently fade with the lapse of time, and fall with the lives of individuals. For the security of rights, whether of states or individuals, long possession under a claim of title is protected." *Rhode Island* v. *Massachusetts*, 4 How. 591, 639 (1846).

See also *California* v. *Nevada*, 447 U. S., at 132 ("If Nevada felt that those lines were inaccurate and operated to deprive it of territory lawfully within its jurisdiction the time to object was when the surveys were conducted, not a century later"); *Ohio* v. *Kentucky*, 410 U. S., at 648–651; *Indiana* v. *Kentucky*, 136 U. S. 479, 509–510 (1890).

legitimate reliance interests of the counties and the other property owners whose title is derived from the 1795 conveyance, the Oneida have not adequately justified their delay.

Of course, the traditional rule was "that 'the conduct of Indians is not to be measured by the same standard which we apply to the conduct of other people.' But their very analogy to persons under guardianship suggests a limitation to their pupilage, since the utmost term of disability of an infant is but 21 years, and it is very rare that the relations of guardian and ward under any circumstances, even those of lunacy, are maintained for a longer period than this." *Felix* v. *Patrick*, 145 U. S., at 330–331 (quoting *The Kansas Indians*, 5 Wall. 737, 758 (1867)). In this case, the testimony at trial indicates that the Oneida people have independently held land derived from tribal allotments at least since the Dawes Act of 1887,[17] and probably earlier in the State of New York.[18] They have received formal schooling at least since 1796 in New York, and have gradually become literate in the English language.[19] They have developed a sophisticated system of tribal government,[20] and at various times in the past 175 years, have petitioned the Government for the redress of grievances, or sent commissions to confer with their brethren.[21]

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[17] General Allotment Act, 24 Stat. 388.

[18] Record Doc. No. 37, p. 227.

[19] *Id.*, at 210, 264. In 1948, the Secretary of the Wisconsin Oneida testified before a Senate Subcommittee that nearly all of the members of the Tribe could speak English fluently, although a few of the older members of the Tribe could not read and write. Hearings on S. 1683 before a Subcommittee of the Senate Committee on Interior and Insular Affairs, 80th Cong., 2d Sess., 41 (1948). At least into the 1950's, however, translators were required at general meetings to explain complicated actions of the Federal Government. Record Doc. No. 37, p. 225.

[20] The Wisconsin Oneida, for example, have been incorporated since 1937, *id.*, at 207, 211–212, with a Constitution, bylaws, and a governing "Business Committee" which is elected by the tribal members. *Id.*, at 211–212. See also *id.*, at 37–41.

[21] In 1874, for example, a party of Wisconsin Oneida traveled to Albany, New York, to confer with a private law firm and members of the New York

In all the years after the 1795 conveyance—until the years leading up to this litigation—the Oneida made few efforts to raise this specific grievance against the State of New York and the landowners holding under the State's title.[22] Claims to lands in New York most often were only made in connection with generalized grievances concerning the Tribe's treatment at the hands of the United States Government.[23] Although the Oneida plainly knew or should have known that they had conveyed their lands to the State of New York in violation of federal law, and that they might have some cause for redress, they inexplicably delayed filing a lawsuit on their claim until 175 years after the conveyance was made. Finally, "[t]here is no evidence that any of the plaintiffs or their predecessors ever refused or returned any of the payments received for the purported sale of land pursuant to the Treaty of 1795."[24]

Tribe about viable alternatives of protest against the Federal Government. *Id.*, at 237–238. The record contains numerous petitions and letters from the Tribe and tribal members in this century seeking the Government's assistance in resolving miscellaneous problems concerning treaty rights, real property ownership, and Government entitlement programs. See Record Ex. Nos. 54, 55.

[22] See, *e. g.*, Record Ex. No. 54 (1909 correspondence).

[23] Although there was much anger, resentment, and bitterness among the Oneida in the 19th century concerning their treatment by the United States, "conditions were being protested, but there was no specification of this particular treaty in the protest." Record Doc. No. 37, p. 248. No specific action was taken to enforce this claim in a court of law until 1951 when the Oneida filed a petition against the United States before the Indian Claims Commission seeking judgment against the United States, as trustee, for the fair market value of the Oneida lands sold to the State of New York since the 18th century. See App. 43a.

[24] Partial Conclusions of Law, App. 152a. There is also a serious question whether the Oneida did not abandon their claim to the aboriginal lands in New York when they accepted the Treaty of Buffalo Creek of 1838, which ceded most of the Tribe's lands in Wisconsin to the United States in exchange for a new reservation in the Indian Territory. The Treaty provided that the new reservation lands were to provide "a permanent home for all the New York Indians, now residing in the State of New York, or in Wisconsin, or elsewhere in the United States, who have no permanent

The Oneida have not met their formidable burden of disproving unjustifiable delay to the prejudice of others. In my opinion their cause of action is barred by the doctrine of laches. The remedy for the ancient wrong established at trial should be provided by Congress, not by judges seeking to rewrite history at this late date.

IV

The Oneida argue that the legislative histories of a series of congressional enactments, beginning in 1952, persuasively establish that their claims have never been barred. This argument has serious flaws, not the least being that whatever Congress said in 1952 or 1966 is extremely weak authority for the status of the common law in 1795, or for a considerable period thereafter. Believing, as I do, that the Oneida's claim was barred by the doctrine of laches or by a related common-law doctrine[25] long before 1952, it is quite clear that the statutes discussed by the Court did not revive it.

First, and most obviously, the principal statute relied on by the Court, by its very terms, only applies to claims brought *by the United States* on behalf of Indians or Indian tribes.[26] This

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homes." 7 Stat. 551, Art. 2. "These proceedings, by which these tribes divested themselves of their title to lands in New York, indicate an intention on the part, both of the Government and the Indians, that they should take immediate possession of the tracts set apart for them in Kansas." *New York Indians* v. *United States*, 170 U. S. 1, 21 (1898). Cf. *United States* v. *Santa Fe R. Co.*, 314 U. S., at 358; n. 9, *supra*.

[25] See n. 9, *supra*.

[26] For example, the relevant portion of 28 U. S. C. § 2415(b) provides: "That an action to recover damages resulting from a trespass on lands of the United States; . . . may be brought within six years after the right of action accrues, except that *such* actions *for or on behalf of a recognized tribe, band, or group of American Indians*, . . . which accrued [prior to the date of enactment of this Act but under subsection (g) are deemed to have accrued on the date of enactment of this Act] may be brought on or before sixty days after the date of the publication of the list required by . . . the Indian Claims Act of 1982: Provided, That, for *those* claims that are on either of the two lists published pursuant to the Indian Claims Act of 1982,

action, of course, is brought by an Indian Tribe *on its own behalf.*

Secondly, neither the statutes themselves,[27] nor the legislative discussions that preceded their enactment,[28] provide

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any right of action shall be barred unless the complaint is filed within (1) one year after the Secretary of the Interior has published in the Federal Register a notice rejecting such claim . . ." (emphasis added).

The Court relies on the word "*any*" in the final clause of the statute and construes this as implicitly providing a federal statute of limitations for causes of action brought by Indian tribes *on their own behalf,* notwithstanding the unmistakable references throughout the statute and its legislative history to claims brought by the United States *on behalf of Indians.* See, *e. g.*, H. R. Rep. No. 96–807, p. 2 (1980); H. R. Rep. No. 92–1267, pp. 2–3 (1972); S. Rep. No. 1328, 89th Cong., 2d Sess., 8–9 (1966); 126 Cong. Rec. 3289 (1980) (remarks of Sen. Melcher); *id.*, at 3290 (remarks of Sen. Cohen); *id.*, at 5745 (remarks of Rep. Clausen); 123 Cong. Rec. 22499 (1977) (remarks of Rep. Cohen); *id.*, at 22507 (remarks of Rep. Dicks); *id.*, at 22509 (remarks of Rep. Studds); *id.*, at 22510 (remarks of Rep. Udall); *ibid.* (remarks of Rep. Yates). Even if the Court's construction were correct, it does not establish that Congress intended to *revive* previously barred causes of action.

[27] Each of the statutes is phrased in a form indicating an intention to preserve the law as it existed on the date of passage. See, *e. g.*, 25 U. S. C. § 233 ("*[N]othing herein contained shall be construed* as conferring jurisdiction on the courts of the State of New York or making applicable the laws of the State of New York in civil actions involving Indian lands or claims with respect thereto which relate to transactions or events transpiring prior to September 13, 1952") (emphasis added); 28 U. S. C. § 2415(c) ("*[N]othing herein shall be deemed* to limit the time for bringing an action to establish the title to, or right of possession of, real or personal property") (emphasis added).

[28] The comments of Representative Morris concerning the meaning of the proviso contained in 25 U. S. C. § 233, reflect an intent to "*preserve* their rights," 96 Cong. Rec. 12460 (1950). The proviso was designed to preserve an "impartial" federal forum for resolving pre-existing Indian land claims and to ensure that federal law would be applied in deciding them. See *Oneida Indian Nation* v. *County of Oneida*, 414 U. S. 661, 680–682 (1974). The application of laches as a federal doctrine of limitation in a federal forum is entirely consistent with this view.

As for § 2415 and its various amendments since 1966, the record is barren of any reference to revival. At most, Congress was of the view that any indication of an intent to *revive* already barred claims.[29] Quite the contrary, they merely indicate a congressional intent to preserve the status quo with respect to ancient claims that might already be barred, and to establish a procedure for making sure that the claims would not survive eternally.

Congress, for the most part, has been quite clear when it decides to revive causes of action that might be barred or to deny any time limitation for a private cause of action.[30] When the will of Congress is as lacking in clarity as it is in this case, we should be wary of attributing to it the intention of reviving ancient claims that will upset long-settled expectations. In divining the intent of Congress concerning the applicable limitation on a cause of action, Chief Justice Marshall once noted that "it deserves some consideration," that in the absence of an applicable limitation, "those actions might, in many cases, be brought at any distance of time. This would be utterly repugnant to the genius of our laws." *Adams* v. *Woods*, 2 Cranch 336, 341 (1805). The Court

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nothing in § 2415 would "preclude" actions by the tribes themselves. See, *e. g.*, 123 Cong. Rec. 22499 (1977) (remarks of Rep. Cohen). It may very well be that in view of the hospitable treatment that these ancient claims received in the lower federal courts, some Members of Congress may have *assumed* that there was no time bar to such actions. In the absence of legislation, however, the assumptions of individual Congressmen about the status of the common law are not enacted into positive law. In enacting the Indian Claims Limitation Act of 1982, Pub. L. 97–394, 96 Stat. 1976, note following 28 U. S. C. § 2415, Congress simply provided a *procedure* for exhausting the Federal Government's responsibility, as trustee, for prosecuting meritorious claims—leaving this Court ultimately to decide whether claims brought by the tribes themselves were still alive.

[29] Indeed, if the statutes had that effect, the Court would have to resolve the question of their constitutionality. Cf. *Stewart* v. *Keyes*, 295 U. S. 403, 417 (1935).

[30] *E. g.*, 25 U. S. C. § 640d–17(b) ("Neither laches nor the statute of limitations shall constitute a defense to any action authorized by this subchapter for existing claims if commenced within two years from December, 22, 1974"); § 653 ("If any claim or claims be submitted to said courts, they shall settle the equitable rights therein, notwithstanding lapse of time or statutes of limitation"); see also *New York Indians* v. *United States*, 170 U. S., at 35.

today prefers to impute to Congress the intent of rewarding those whom "Abraham Lincoln once described with scorn [as sitting] in the basements of courthouses combing property records to upset established titles." *Arizona* v. *California*, 460 U. S. 605, 620 (1983). The more appropriate presumption in this case is that Congress intended to honor legitimate expectations in the ownership of real property and not to disturb them.

V

The Framers recognized that no one ought be condemned for his forefathers' misdeeds—even when the crime is a most grave offense against the Republic.[31] The Court today ignores that principle in fashioning a common-law remedy for the Oneida Nation that allows the Tribe to avoid its 1795 conveyance 175 years after it was made. This decision upsets long-settled expectations in the ownership of real property in the Counties of Oneida and Madison, New York, and the disruption it is sure to cause will confirm the common-law wisdom that ancient claims are best left in repose. The Court, no doubt, believes that it is undoing a grave historical injustice, but in doing so it has caused another, which only Congress may now rectify.

I respectfully dissent.

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[31] U. S. Const. Art. III, §3, cl. 2 ("no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the person attainted"). Cf. *Adams* v. *Woods*, 2 Cranch 336, 341 (1805) ("In a country where not even treason can be prosecuted after a lapse of three years, it could scarcely be supposed that an individual would remain for ever liable to a pecuniary forfeiture").

SUPREME COURT OF NEW HAMPSHIRE *v.* PIPER

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 83-1466. Argued October 31, 1984—Decided March 4, 1985

Appellee, a resident of Vermont, was allowed to take, and passed, the New Hampshire bar examination. But pursuant to Rule 42 of the New Hampshire Supreme Court, which limits bar admission to state residents, she was not permitted to be sworn in. After the New Hampshire Supreme Court denied appellee's request that an exception to the Rule be made in her case, she filed an action in Federal District Court, alleging that Rule 42 violates the Privileges and Immunities Clause of Art. IV, § 2, of the United States Constitution. The District Court agreed and granted appellee's motion for a summary judgment. The Court of Appeals affirmed.

Held: Rule 42 violates the Privileges and Immunities Clause of Art. IV, § 2. Pp. 279-288.

(a) Derived, like the Commerce Clause, from the fourth of the Articles of Confederation, the Privileges and Immunities Clause was intended to create a national economic union. "[O]ne of the privileges which the Clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State." *Toomer* v. *Witsell,* 334 U. S. 385, 396. Moreover, although a lawyer is "an officer of the court," he does not hold a position that can be entrusted only to a "full-fledged member of the political community" and thus is not an "officer" of the State in any political sense. *In re Griffiths,* 413 U. S. 717. Therefore, a nonresident's interest in practicing law is a "privilege" protected by the Clause. Pp. 279-283.

(b) A State may discriminate against nonresidents only where its reasons are "substantial" and the difference in treatment bears a close or substantial relationship to those reasons. None of the reasons offered by appellant for its refusal to admit nonresidents to the bar—nonresidents would be less likely to keep abreast of local rules and procedures, to behave ethically, to be available for court proceedings, and to do *pro bono* and other volunteer work in the State—meets the test of "substantiality," and the means chosen do not bear the necessary relationship to the State's objectives. Pp. 284-287.

723 F. 2d 110, affirmed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, MARSHALL, BLACKMUN, STEVENS, and O'CONNOR, JJ., joined. WHITE, J., filed an opinion concurring in the result, *post*, p. 288. REHNQUIST, J., filed a dissenting opinion, *post*, p. 289.

Martin L. Gross argued the cause for appellant. With him on the briefs were *Gregory H. Smith*, Attorney General of New Hampshire, and *Martha V. Gordon*.

Jon Meyer argued the cause and filed a brief for appellee.*

JUSTICE POWELL delivered the opinion of the Court.

The Rules of the Supreme Court of New Hampshire limit bar admission to state residents. We here consider whether this restriction violates the Privileges and Immunities Clause of the United States Constitution, Art. IV, §2.

I

A

Kathryn Piper lives in Lower Waterford, Vermont, about 400 yards from the New Hampshire border. In 1979, she

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*Briefs of *amici curiae* urging reversal were filed for the State of Iowa by *Thomas J. Miller*, Attorney General, and *Brent R. Appel*, Deputy Attorney General; for the State of Tennessee by *William M. Leech, Jr.*, Attorney General, *William B. Hubbard*, Chief Deputy Attorney General, and *Andy D. Bennett* and *William P. Sizer*, Assistant Attorneys General; and for the Commonwealth of Virginia et al. by *Gerald L. Baliles*, Attorney General of Virginia, *William G. Broaddus*, Chief Deputy Attorney General, and *Elizabeth B. Lacy*, Deputy Attorney General, *Tany S. Hong*, Attorney General of Hawaii, *Linley E. Pearson*, Attorney General of Indiana, *Robert T. Stephan*, Attorney General of Kansas, *John D. Ashcroft*, Attorney General of Missouri, *Brian McKay*, Attorney General of Nevada, and *William E. Isaeff*, Chief Deputy Attorney General, *Anthony J. Celebrezze, Jr.*, Attorney General of Ohio, *Bronson C. La Follette*, Attorney General of Wisconsin, and *Leroy L. Dalton*, Assistant Attorney General, *A. G. McClintock*, Attorney General of Wyoming, *Rufus Edmisten*, Attorney General of North Carolina, and *Harry H. Harkins, Jr.*, Assistant Attorney General, *Jack Pope*, Chief Justice of the Supreme Court of Texas, and *Sarah Singleton*.

Briefs of *amici curiae* urging affirmance were filed for the American Corporate Council Association by *Jerry M. Aufox* and *Thomas I. Davenport;* for the Vermont Bar Association by *James C. Gallagher;* and for Public Citizen, Inc., by *John Cary Sims* and *Alan B. Morrison*.

applied to take the February 1980 New Hampshire bar examination. Piper submitted with her application a statement of intent to become a New Hampshire resident. Following an investigation, the Board of Bar Examiners found that Piper was of good moral character and met the other requirements for admission. She was allowed to take, and passed, the examination. Piper was informed by the Board that she would have to establish a home address in New Hampshire prior to being sworn in.

On May 7, 1980, Piper requested from the Clerk of the New Hampshire Supreme Court a dispensation from the residency requirement. Although she had a "possible job" with a lawyer in Littleton, New Hampshire, Piper stated that becoming a resident of New Hampshire would be inconvenient. Her house in Vermont was secured by a mortgage with a favorable interest rate, and she and her husband recently had become parents. According to Piper, these "problems peculiar to [her] situation . . . warrant[ed] that an exception be made." Letter from Appellee to Ralph H. Wood, Esq., Clerk of N. H. Supreme Court, App. 13.

On May 13, 1980, the Clerk informed Piper that her request had been denied. She then formally petitioned the New Hampshire Supreme Court for permission to become a member of the bar. She asserted that she was well qualified and that her "situation [was] sufficiently unique that the granting of an exception . . . [would] not result in the setting of any undesired precedent." Letter of Nov. 8, 1980, from Appellee to Hon. William A. Grimes, then Chief Justice of the N. H. Supreme Court, App. 15. The Supreme Court denied Piper's formal request on December 31, 1980.

B

On March 22, 1982, Piper filed this action in the United States District Court for the District of New Hampshire. She named as defendants the State Supreme Court, its five

Justices, and its Clerk. She alleged that Rule 42 of the New Hampshire Supreme Court, that excludes nonresidents from the bar,[1] violates the Privileges and Immunities Clause of Art. IV, § 2, of the United States Constitution.[2]

On May 17, 1982, the District Court granted Piper's motion for summary judgment. 539 F. Supp. 1064. The court first stated that the opportunity to practice law is a "fundamental" right within the meaning of *Baldwin* v. *Montana Fish & Game Comm'n*, 436 U. S. 371 (1978). It then found that Piper had been denied this right in the absence of a "substantial reason," 539 F. Supp., at 1072, and that Rule 42 was not "closely tailored" to achieve its intended goals, *id.*, at 1073. The court therefore concluded that New Hampshire's residency requirement violated the Privileges and Immunities Clause.[3]

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[1] Rule 42 does not provide explicitly that only New Hampshire residents may be admitted to the bar. It does require, however, that an applicant either be a resident of New Hampshire or file a statement of intent to reside there. N. H. Sup. Ct. Rule 42(3). In an affidavit submitted to the District Court, the Chief Justice of the Supreme Court of New Hampshire said that under the Rule, an applicant for admission must be "a *bona fide* resident of the State . . . at the time that the oath of office . . . is administered." Affidavit of John W. King, App. 32. Accordingly, the parties agree that the refusal to admit Piper to the bar was based on Rule 42.

[2] Piper was not excluded totally from the practice of law in New Hampshire. Out-of-state lawyers may appear *pro hac vice* in state court. This alternative, however, does not allow the nonresident to practice in New Hampshire on the same terms as a resident member of the bar. The lawyer appearing *pro hac vice* must be associated with a local lawyer who is present for trial or argument. See N. H. Sup. Ct. Rule 33(1); N. H. Super. Ct. Rule 19. Furthermore, the decision on whether to grant *pro hac vice* status to an out-of-state lawyer is purely discretionary. See *Leis* v. *Flynt*, 439 U. S. 438, 442 (1979) *(per curiam)*.

[3] The District Court did not consider Piper's claims that Rule 42: (i) deprived her of property without due process of law, in violation of the Fourteenth Amendment; (ii) denied her equal protection of the law, in violation of the Fourteenth Amendment; and (iii) placed an undue burden

An evenly divided Court of Appeals for the First Circuit, sitting en banc, affirmed the judgment in favor of Piper. 723 F. 2d 110 (1983).[4] The prevailing judges held that Rule 42 violated the Privileges and Immunities Clause. After finding that Art. IV, § 2, protects an individual's right to "'pursue a livelihood in a State other than his own,'" *id.*, at 112, (quoting *Baldwin* v. *Montana Fish & Game Comm'n*, *supra*, at 386), the judges applied the two-part test set forth in *Hicklin* v. *Orbeck*, 437 U. S. 518 (1978). They concluded that there was no "substantial reason" for the different treatment of nonresidents and that the challenged discrimination bore no "substantial relationship" to the State's objectives.[5] See *id.*, at 525–527.

The dissenting judges found that the New Hampshire Supreme Court's residency requirement did not violate the Privileges and Immunities Clause. While recognizing that Rule 42 may "serve the less than commendable purpose of insulating New Hampshire practitioners from out-of-state competition," 723 F. 2d, at 119, they found several "substantial" reasons to justify discrimination against nonresidents. If the residency requirement were abolished, "large law firms in distant states" might exert significant influence over the state bar. *Ibid.* These nonresident lawyers would be unfamiliar with local customs and would be less likely to perform *pro bono* work within the State. The dissenting judges

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upon interstate commerce, in violation of Art. I, § 8, of the United States Constitution. The Court of Appeals did not address these claims, and our resolution of this case makes it unnecessary for us to reach them.

[4] The panel, with one judge dissenting, had reversed the District Court's judgment. 723 F. 2d 98 (1983).

[5] The prevailing judges thought it significant that three State Supreme Courts had invalidated their own bar residency requirements. *Sargus* v. *West Virginia Board of Law Examiners*, —— W. Va. ——, 294 S. E. 2d 440 (1982); *Noll* v. *Alaska Bar Assn.*, 649 P. 2d 241 (Alaska 1982); *Gordon* v. *Committee on Character and Fitness*, 48 N. Y. 2d 266, 397 N. E. 2d 1309 (1979). Since the Court of Appeals decision in this case, another State Supreme Court has reached the same conclusion. *In re Jadd*, 391 Mass. 227, 461 N. E. 2d 760 (1984).

further believed the District Court's judgment was inconsistent with our decision in *Leis* v. *Flynt*, 439 U. S. 438 (1979) *(per curiam)*.

The Supreme Court of New Hampshire filed a timely notice of appeal, and we noted probable jurisdiction. 466 U. S. 949 (1984). We now affirm the judgment of the court below.

II

A

Article IV, § 2, of the Constitution provides that the "Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[6] This Clause was intended to "fuse into one Nation a collection of independent, sovereign States." *Toomer* v. *Witsell*, 334 U. S. 385, 395 (1948). Recognizing this purpose, we have held that it is "[o]nly with respect to those 'privileges' and 'immunities' bearing on the vitality of the Nation as a single entity" that a State must accord residents and nonresidents equal treatment. *Baldwin* v. *Montana Fish & Game Comm'n*, *supra*, at 383. In *Baldwin*, for example, we concluded that a State may charge a nonresident more than it charges a resident for the same elk-hunting license. Because elk hunting is "recreation" rather than a "means of a livelihood," we found that the right to a hunting license was not "fundamental" to the promotion of interstate harmony. 436 U. S., at 388.

Derived, like the Commerce Clause, from the fourth of the Articles of Confederation,[7] the Privileges and Immunities

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[6] Under this Clause, the terms "citizen" and "resident" are used interchangeably. See *Austin* v. *New Hampshire*, 420 U. S. 656, 662, n. 8 (1975). Under the Fourteenth Amendment, of course, "[a]ll persons born or naturalized in the United States . . . are citizens . . . of the State wherein they reside."

[7] Article IV of the Articles of Confederation provided:

"The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants

Clause was intended to create a national economic union.[8] It is therefore not surprising that this Court repeatedly has found that "one of the privileges which the Clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State." *Toomer* v. *Witsell*, *supra*, at 396. In *Ward* v. *Maryland*, 12 Wall. 418 (1871), the Court invalidated a statute under which nonresidents were required to pay $300 per year for a license to trade in goods not manufactured in Maryland, while resident traders paid a fee varying from $12 to $150. Similarly, in *Toomer*, *supra*, the Court held that nonresident fishermen could not be required to pay a license fee of $2,500 for each shrimp boat owned when residents were charged only $25 per boat. Finally, in *Hicklin* v. *Orbeck*, 437 U. S. 518 (1978), we found violative of the Privileges and Immunities Clause a statute containing a resident hiring preference for all employment related to the development of the State's oil and gas resources.[9]

There is nothing in *Ward*, *Toomer*, or *Hicklin* suggesting that the practice of law should not be viewed as a "privilege"

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of each of these States . . . shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof . . . ."

Charles Pinckney, who drafted the Privileges and Immunities Clause, stated that it was "formed exactly upon the principles of the 4th article of the present Confederation." 3 M. Farrand, Records of the Federal Convention of 1787, p. 112 (1911).

[8] This Court has recognized the "mutually reinforcing relationship" between the Commerce Clause and the Privileges and Immunities Clause. *Hicklin* v. *Orbeck*, 437 U. S. 518, 531 (1978).

[9] In *United Building & Construction Trades Council* v. *Mayor & Council of Camden*, 465 U. S. 208 (1984), we stated that "the pursuit of a common calling is one of the most fundamental of those privileges protected by the Clause." *Id.*, at 219. We noted that "[m]any, if not most, of our cases expounding the Privileges and Immunities Clause have dealt with this basic and essential activity." *Ibid.*

under Art. IV, § 2.[10] Like the occupations considered in our earlier cases, the practice of law is important to the national economy. As the Court noted in *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773, 788 (1975), the "activities of lawyers play an important part in commercial intercourse."

The lawyer's role in the national economy is not the only reason that the opportunity to practice law should be considered a "fundamental right." We believe that the legal profession has a noncommercial role and duty that reinforce the view that the practice of law falls within the ambit of the Privileges and Immunities Clause.[11] Out-of-state lawyers may—and often do—represent persons who raise unpopular federal claims. In some cases, representation by nonresident counsel may be the only means available for the vindication of federal rights. See *Leis* v. *Flynt*, 439 U. S., at 450 (STEVENS, J., dissenting). The lawyer who champions unpopular causes surely is as important to the "maintenance or well-being of the Union," *Baldwin*, 436 U. S., at 388, as was the shrimp fisherman in *Toomer* or the pipeline worker in *Hicklin*.

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[10] In *Corfield* v. *Coryell*, 6 F. Cas. 546 (No. 3,230) (CCED Pa. 1825), Justice Bushrod Washington, sitting as Circuit Justice, stated that the "fundamental rights" protected by the Clause included:

> "The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal . . . ." *Id.*, at 552.

Thus in this initial interpretation of the Clause, "professional pursuits," such as the practice of law, were said to be protected.

The "natural rights" theory that underlay *Corfield* was discarded long ago. *Hague* v. *CIO*, 307 U. S. 496, 511 (1939) (opinion of Roberts, J.); see *Paul* v. *Virginia*, 8 Wall. 168 (1869). Nevertheless, we have noted that those privileges on Justice Washington's list would still be protected by the Clause. *Baldwin* v. *Montana Fish & Game Comm'n*, 436 U. S. 371, 387 (1978).

[11] The Court has never held that the Privileges and Immunities Clause protects only economic interests. See *Doe* v. *Bolton*, 410 U. S. 179 (1973) (Georgia statute permitting only residents to secure abortions found violative of the Privileges and Immunities Clause).

B

Appellant asserts that the Privileges and Immunities Clause should be held inapplicable to the practice of law because a lawyer's activities are "bound up with the exercise of judicial power and the administration of justice."[12] Its contention is based on the premise that the lawyer is an "officer of the court," who "exercises state power on a daily basis." Appellant concludes that if the State cannot exclude nonresidents from the bar, its ability to function as a sovereign political body will be threatened.[13]

Lawyers do enjoy a "broad monopoly . . . to do things other citizens may not lawfully do." *In re Griffiths*, 413 U. S. 717, 731 (1973). We do not believe, however, that the practice of law involves an "exercise of state power" justifying New Hampshire's residency requirement. In *In re Griffiths*, *supra*, we held that the State could not exclude an alien from the bar on the ground that a lawyer is an "'officer of the Court who' . . . is entrusted with the 'exercise of actual governmental power.'" *Id.*, at 728 (quoting Brief for Appellee in *In re Griffiths*, O. T. 1972, No. 71–1336, p. 5). We concluded that a lawyer is not an "officer" within the ordinary meaning of that word. 413 U. S., at 728. He "'makes his own decisions, follows his own best judgment, collects his own fees and runs his own business.'" *Id.*, at 729 (quoting *Cammer* v. *United States*, 350 U. S. 399, 405 (1956)). Moreover, we held that the state powers entrusted to lawyers do not "involve matters of state policy or acts of such unique responsibility as to entrust them only to citizens." 413 U. S., at 724.[14]

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[12] JUSTICE REHNQUIST makes a similar argument in his dissent. He asserts that lawyers, through their adversary representation of clients' interests, "play an important role in the formulation of state policy." *Post*, at 293. He therefore concludes that the residency requirement is necessary to ensure that lawyers are "intimately conversant with the local concerns that should inform such policies." *Ibid.* We believe that this argument, like the one raised by the State, is foreclosed by our reasoning in *In re Griffiths*, 413 U. S. 717 (1973). There, we held that the status of being licensed to practice law does not place a person so close to the core of the political process as to make him a "formulator of government policy." *Id.*, at 729.

[13] We recognize that without certain residency requirements the State "would cease to be the separate political communit[y] that history and the constitutional text make plain w[as] contemplated." Simson, Discrimination Against Nonresidents and the Privileges and Immunities Clause of Article IV, 128 U. Pa. L. Rev. 379, 387 (1979). A State may restrict to its residents, for example, both the right to vote, see *Dunn* v. *Blumstein*, 405 U. S. 330, 343, 344 (1972), and the right to hold state elective office. *Baldwin* v. *Montana Fish & Game Comm'n*, *supra*, at 383.

Because, under *Griffiths*, a lawyer is not an "officer" of the State in any political sense,[15] there is no reason for New Hampshire to exclude from its bar nonresidents. We therefore conclude that the right to practice law is protected by the Privileges and Immunities Clause.[16]

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[14] In *Griffiths, supra*, we were concerned with discrimination by a State against aliens. Such discrimination usually is subject to an enhanced level of scrutiny. *Graham* v. *Richardson*, 403 U. S. 365 (1971). The difference between the levels of scrutiny under the Equal Protection Clause and the Privileges and Immunities Clause, however, does not affect the relevance of *Griffiths*. There, we did not subject to "strict scrutiny" the State's argument that the lawyer is "an officer of the court" entrusted with the "exercise of actual governmental power." Instead, we considered this argument only in deciding whether "strict scrutiny" should be applied at all to the challenged classification. 413 U. S., at 727.

[15] It is true that lawyers traditionally have been leaders in state and local affairs—political as well as cultural, religious, and civic. Their training qualifies them for this type of participation. Nevertheless, lawyers are not in any sense officials in the government simply by virtue of being lawyers.

[16] Our conclusion that Rule 42 violates the Privileges and Immunities Clause is consistent with *Leis* v. *Flynt*, 439 U. S. 438 (1979). In *Leis*, we held that a lawyer could be denied, without the benefit of a hearing, permission to appear *pro hac vice*. We concluded that the States should be

III

The conclusion that Rule 42 deprives nonresidents of a protected privilege does not end our inquiry. The Court has stated that "[l]ike many other constitutional provisions, the privileges and immunities clause is not an absolute." *Toomer* v. *Witsell*, 334 U. S., at 396; see *United Building & Construction Trades Council* v. *Mayor & Council of Camden*, 465 U. S. 208, 222 (1984). The Clause does not preclude discrimination against nonresidents where (i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective. *Ibid.* In deciding whether the discrimination bears a close or substantial relationship to the State's objective, the Court has considered the availability of less restrictive means.[17]

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left free to "prescribe the qualifications for admission to practice and the standards of professional conduct" for those lawyers who appear in its courts. *Id.*, at 442.

Our holding in this case does not interfere with the ability of the States to regulate their bars. The nonresident who seeks to join a bar, unlike the *pro hac vice* applicant, must have the same professional and personal qualifications required of resident lawyers. Furthermore, the nonresident member of the bar is subject to the full force of New Hampshire's disciplinary rules. N. H. Sup. Ct. Rule 37. See n. 23, *infra.*

[17] In *Toomer* v. *Witsell*, 334 U. S. 385 (1948), for example, the Court noted that the State could eliminate the danger of excessive trawling through less restrictive means: restricting the type of equipment used in its fisheries, graduating license fees according to the size of the boats, or charging nonresidents a differential to compensate for the added enforcement burden they imposed. *Id.*, at 398–399.

The dissent asserts that less restrictive means are relevant only to the extent that they indicate that the State "had another, less legitimate goal in mind." Presumably, the only goal that the dissent would view as "illegitimate" would be discrimination for its own sake. We do not believe, however, that the "less restrictive means" analysis has such a limited purpose in the privileges and immunities context. In some cases, the State may be required to achieve its legitimate goals without unnecessarily discriminating against nonresidents.

The Supreme Court of New Hampshire offers several justifications for its refusal to admit nonresidents to the bar. It asserts that nonresident members would be less likely (i) to become, and remain, familiar with local rules and procedures; (ii) to behave ethically; (iii) to be available for court proceedings; and (iv) to do *pro bono* and other volunteer work in the State.[18] We find that none of these reasons meets the test of "substantiality," and that the means chosen do not bear the necessary relationship to the State's objectives.

There is no evidence to support appellant's claim that nonresidents might be less likely to keep abreast of local rules and procedures. Nor may we assume that a nonresident lawyer—any more than a resident—would disserve his clients by failing to familiarize himself with the rules. As a practical matter, we think that unless a lawyer has, or anticipates, a considerable practice in the New Hampshire courts, he would be unlikely to take the bar examination and pay the annual dues of $125.[19]

We also find the appellant's second justification to be without merit, for there is no reason to believe that a nonresident lawyer will conduct his practice in a dishonest manner. The nonresident lawyer's professional duty and interest in his reputation should provide the same incentive to maintain high ethical standards as they do for resident lawyers. A lawyer will be concerned with his reputation in any community where he practices, regardless of where he may live. Furthermore, a nonresident lawyer may be disciplined for unethical conduct. The Supreme Court of New Hampshire has the authority to discipline all members of the bar, regardless of where they reside. See N. H. Sup. Ct. Rule 37.[20]

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[18] A former president of the American Bar Association has suggested another possible reason for the rule: "Many of the states that have erected fences against out-of-state lawyers have done so primarily to protect their own lawyers from professional competition." Smith, Time for a National Practice of Law Act, 64 A. B. A. J. 557 (1978). This reason is not "substantial." The Privileges and Immunities Clause was designed primarily to prevent such economic protectionism.

[19] Because it is markedly overinclusive, the residency requirement does not bear a substantial relationship to the State's objective. A less restrictive alternative would be to require mandatory attendance at periodic seminars on state practice. There already is a rule requiring all new admittees to complete a "practical skills course" within one year of their admission. N. H. Sup. Ct. Rule 42(7).

New Hampshire's "simple residency" requirement is underinclusive as well, because it permits lawyers who move away from the State to retain their membership in the bar. There is no reason to believe that a former resident would maintain a more active practice in the New Hampshire courts than would a nonresident lawyer who had never lived in the State.

There is more merit to appellant's assertion that a nonresident member of the bar at times would be unavailable for court proceedings. In the course of litigation, pretrial hearings on various matters often are held on short notice. At times a court will need to confer immediately with counsel. Even the most conscientious lawyer residing in a distant State may find himself unable to appear in court for an unscheduled hearing or proceeding.[21] Nevertheless, we do not believe that this type of problem justifies the exclusion of nonresidents from the state bar. One may assume that a high percentage of nonresident lawyers willing to take the state bar examination and pay the annual dues will reside in places reasonably convenient to New Hampshire. Furthermore, in those cases where the nonresident counsel will be unavailable on short notice, the State can protect its interests through less restrictive means. The trial court, by rule or as an exercise of discretion, may require any lawyer who resides at a great distance to retain a local attorney who will be available for unscheduled meetings and hearings.

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[20] The New Hampshire Bar would be able to discipline a nonresident lawyer in the same manner in which it disciplines resident members. The Supreme Judicial Court of Massachusetts has stated that although there are over 5,000 nonresident members of the Massachusetts Bar, there has been no problem "obtaining jurisdiction over them for bar discipline purposes." *In re Jadd*, 391 Mass., at 234, 461 N. E. 2d, at 765. A committee of the Oregon Bar voiced a similar sentiment: "[W]hy should it be more difficult for the Multnomah County courts to control an attorney from Vancouver, Washington, than from Lakeview, Oregon, if both attorneys are members of the Oregon Bar and subject to its rules and discipline?" Bar Admissions Study Committee, Report to the Supreme Court of Oregon 19 (Jan. 19, 1979).

[21] In many situations, unscheduled hearings may pose only a minimal problem for the nonresident lawyer. Conference telephone calls are being used increasingly as an expeditious means of dispatching pretrial matters. Hanson, Olson, Shuart, & Thornton, Telephone Hearings in Civil Trial Courts: What Do Attorneys Think?, 66 Judicature 408, 408–409 (1983).

The final reason advanced by appellant is that nonresident members of the state bar would be disinclined to do their share of *pro bono* and volunteer work. Perhaps this is true to a limited extent, particularly where the member resides in a distant location. We think it is reasonable to believe, however, that most lawyers who become members of a state bar will endeavor to perform their share of these services. This sort of participation, of course, would serve the professional interest of a lawyer who practices in the State. Furthermore, a nonresident bar member, like the resident member, could be required to represent indigents and perhaps to participate in formal legal-aid work.[22]

In summary, appellant neither advances a "substantial reason" for its discrimination against nonresident applicants to the bar,[23] nor demonstrates that the discrimination practiced bears a close relationship to its proffered objectives.

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[22] The El Paso, Texas, Bar has adopted a mandatory *pro bono* plan, under which each of its members must handle two divorce cases for indigents each year. *Pro Bono Publico:* Federal Legal-Aid Cuts Spur the Bar to Increase Free Work for the Poor, The Wall Street Journal, Mar. 30, 1984, pp. 1, 12.

[23] JUSTICE REHNQUIST suggests another "substantial reason" for the residency requirement: the State's "interest in maximizing the number of resident lawyers, so as to increase the quality of the pool from which its lawmakers can be drawn." *Post,* at 292. Only 8 of the 424 members of New Hampshire's bicameral legislature are lawyers. Statistics compiled by the Clerk of the New Hampshire House of Representatives and the

IV

We conclude that New Hampshire's bar residency requirement violates the Privileges and Immunities Clause of Art. IV, § 2, of the United States Constitution. The nonresident's interest in practicing law is a "privilege" protected by the Clause. Although the lawyer is "an officer of the court," he does not hold a position that can be entrusted only to a "full-fledged member of the political community." A State may discriminate against nonresidents only where its reasons are "substantial," and the difference in treatment bears a close or substantial relation to those reasons. No such showing has been made in this case. Accordingly, we affirm the judgment of the Court of Appeals.

It is so ordered.

JUSTICE WHITE, concurring in the result.

Appellee Piper lives only 400 yards from the New Hampshire border. She has passed the New Hampshire bar examination and intends to practice law in New Hampshire. Indeed, insofar as this record reveals, the only law office she will maintain is in New Hampshire. But because she will commute from Vermont rather than reside in New Hampshire, she will not be allowed to practice in the latter State.

I have no doubt that the New Hampshire residency requirement is invalid as applied to appellee Piper. Except for the fact that she will commute from Vermont, she would be indistinguishable from other New Hampshire lawyers. There is every reason to believe that she will be as able as

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Clerk of the New Hampshire Senate. Moreover, New Hampshire, unlike many other States, see, *e. g.*, Mich. Const., Art. 6, § 19, does not prohibit nonlawyers from serving on its Supreme Court, N. H. Rev. Stat. Ann. § 490:1 *et seq.* (1983 and Supp. 1983), or its intermediate appellate court, N. H. Rev. Stat. Ann. § 491:1 *et seq.* (1983 and Supp. 1983). Therefore, it is not surprising that the dissent's justification for the residency requirement was not raised by appellant or addressed by the courts below.

other New Hampshire lawyers to maintain professional competence, to stay abreast of local rules and procedures, to be available for sudden hearings, and to satisfy any requirements of a member of the New Hampshire bar to perform *pro bono* and volunteer work. It does not appear that her nonresidency presents a special threat to any of the State's interests that is not shared by lawyers living in New Hampshire. Hence, I conclude that the Privileges and Immunities Clause forbids her exclusion from the New Hampshire Bar.

The foregoing is enough to dispose of this case. I do not, and the Court itself need not, reach out to decide the facial validity of the New Hampshire residency requirement. I would postpone to another day such questions as whether the State may constitutionally condition membership in the New Hampshire Bar upon maintaining an office for the practice of law in the State of New Hampshire.

I concur in the judgment invalidating the New Hampshire residency requirement as applied to appellee Piper.

JUSTICE REHNQUIST, dissenting.

Today the Court holds that New Hampshire cannot decide that a New Hampshire lawyer should live in New Hampshire. This may not be surprising to those who view law as just another form of business frequently practiced across state lines by interchangeable actors; the Privileges and Immunities Clause of Art. IV, §2, has long been held to apply to States' attempts to discriminate against nonresidents who seek to ply their trade interstate. The decision will be surprising to many, however, because it so clearly disregards the fact that the practice of law is—almost by definition—fundamentally different from those other occupations that are practiced across state lines without significant deviation from State to State. The fact that each State is free, in a large number of areas, to establish *independently* of the other States its own laws for the governance of its citizens, is a fundamental precept of our Constitution that, I submit, is of equal stature with the need for the States to form a cohesive union. What is at issue here is New Hampshire's right to decide that those people who in many ways will intimately deal with New Hampshire's self-governance should reside within that State.

The Court's opinion states that the Privileges and Immunities Clause of Art. IV, §2, "was intended to 'fuse into one Nation a collection of independent, sovereign States.'" *Ante*, at 279 (quoting *Toomer* v. *Witsell*, 334 U. S. 385, 395 (1948)). To this end, we are told, the Clause has been construed to protect the fundamental "privilege" of citizens of one State to do business in another State on terms substantially equal with that State's citizens. This privilege must be protected to effectuate the Clause's purpose to "create a national economic union." *Ante*, at 280. And for the Court, the practice of law is no different from those occupations considered in earlier Privileges and Immunities Clause cases, because "the practice of law is important to the national economy." *Ante*, at 281. After concluding that the Clause applies to lawyers, the Court goes on to reject the many reasons the Supreme Court of New Hampshire advances for limiting the State's lawyers to those who reside in state. The Court either labels these reasons insubstantial, or it advances, with the assurance of an inveterate second-guesser, a "less restrictive means" for the State to attack the perceived problem.

The Framers of our Constitution undoubtedly wished to ensure that the newly created Union did not revert to its component parts because of interstate jealousies and insular tendencies, and it seems clear that the Art. IV Privileges and Immunities Clause was one result of these concerns. But the Framers also created a system of federalism that deliberately allowed for the independent operation of many sovereign States, each with their own laws created by their own legislators and judges. The assumption from the beginning was that the various States' laws need not, and would not, be the same; the lawmakers of each State might endorse different philosophies and would have to respond to differing interests of their constituents, based on various factors that were of inherently local character. Any student of our Nation's history is well aware of the differing interests of the various States that were represented at Philadelphia; despite the tremendous improvements in transportation and communication that have served to create a more homogeneous country the differences among the various States have hardly disappeared.

It is but a small step from these facts to the recognition that a State has a very strong interest in seeing that its legislators and its judges come from among the constituency of state residents, so that they better understand the local interests to which they will have to respond. The Court does not contest this point; it recognizes that a State may require its lawmakers to be residents without running afoul of the Privileges and Immunities Clause of Art. IV, § 2. See *ante*, at 282, n. 13.

Unlike the Court, I would take the next step, and recognize that the State also has a very "substantial" interest in seeing that its lawyers also are members of that constituency. I begin with two important principles that the Court seems to have forgotton: first, that in reviewing state statutes under this Clause "States should have considerable leeway in analyzing local evils and prescribing appropriate cures," *United Building & Construction Trades Council* v. *Mayor & Council of Camden*, 465 U. S. 208, 223 (1984) (citing *Toomer*, *supra*, at 396), and second, that regulation of the practice of law generally has been "left exclusively to the States . . . ." *Leis* v. *Flynt*, 439 U. S. 438, 442 (1979) *(per curiam)*. My belief that the practice of law differs from other trades and businesses for Art. IV, § 2, purposes is not based on some notion that law is for some reason a superior profession. The reason that the practice of law should be treated differently is that law is one occupation that does not readily translate across state lines.[1] Certain aspects of legal practice are distinctly and intentionally *nonnational;* in this regard one might view this country's legal system as the antithesis of the norms embodied in the Art. IV Privileges and Immunities Clause. Put simply, the State has a substantial interest in creating its own set of laws responsive to its own local interests, and it is reasonable for a State to decide that those people who have been trained to analyze law and policy are better equipped to write those state laws and adjudicate cases arising under them. The State therefore may decide that it has an interest in maximizing the number of resident lawyers, so as to increase the quality of the pool from which its lawmakers can be drawn.[2] A residency law such as the one at issue is the obvious way to accomplish these goals. Since at any given time within a State there is only enough legal work to support a certain number of lawyers, each out-of-state lawyer who is allowed to practice necessarily takes legal work that could support an in-state lawyer, who would otherwise be available to perform various functions that a State has an interest in promoting.[3]

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[1] I do not mean to suggest that the practice of law, unlike other occupations, is not a "fundamental" interest subject to the two-step analysis outlined by the Court. It makes little difference to me which prong of the Court's analysis is implicated, although the thrust of my position is that there are significant state interests justifying this type of interstate discrimination. Although one might wonder about the logical extensions of the Court's loose language concerning "less restrictive means," see *ante,* at 284–287, the Court's opinion clearly contemplates that some residency requirements concerning trades or businesses will be permissible under the Privileges and Immunities Clause. I note that New Hampshire's decision with respect to lawyers certainly will not be the only residency requirement for which States could forward substantial reasons, nor will any valid residency requirement necessarily involve only one particular trade or business. We indicated as much last Term in *United Building & Construction Trades Council* v. *Mayor & Council of Camden,* 465 U. S. 208 (1984).

[2] The Court attempts to rebut this argument with statistics indicating the number of presently practicing lawyers in the New Hampshire Legislature. *Ante,* at 287–288, n. 23. While I am not convinced of the usefulness of these statistics, I note in any event that the Court neglects to point out that only 6 of the 124 judges presently sitting in New Hampshire courts are nonlawyers, and that only 12 of the 89 Supreme Court Justices in the State's history have been nonlawyers.

Nor does the State's interest end with enlarging the pool of qualified lawmakers. A State similarly might determine that because lawyers play an important role in the formulation of state policy through their adversary representation, they should be intimately conversant with the local concerns that should inform such policies. And the State likewise might conclude that those citizens trained in the law are likely to bring their useful expertise to other important functions that benefit from such expertise and are of interest to state governments—such as trusteeships, or directorships of corporations or charitable organizations, or school board positions, or merely the role of the interested citizen at a town meeting. Thus, although the Court suggests that state bars can require out-of-state members to "represent indigents and perhaps to participate in formal legal-aid work," *ante*, at 287, the Court ignores a host of other important functions that a State could find would likely be performed only by in-state bar members. States may find a substantial interest in members of their bar being residents, and this insular interest—as with the opposing interest in interstate harmony represented by Art. IV, § 2—itself has its genesis in the language and structure of the Constitution.[4]

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[3] In New Hampshire's case, lawyers living 40 miles from the state border in Boston could easily devote part of their practice to New Hampshire clients. If this occurred a significant amount of New Hampshire legal work might wind up in Boston, along with lawyers who might otherwise reside in New Hampshire.

[4] I do not find the analysis of *In re Griffiths*, 413 U. S. 717 (1973), to be controlling here. *Griffiths* dealt with an Equal Protection Clause challenge to a state bar admission rule that excluded aliens. In the course of striking down that restriction this Court held that lawyers should not be considered "officers of the court" in the sense that they actually wield state powers. *Id.*, at 727–729. Whatever the merits of that conclusion, my

It is no answer to these arguments that many lawyers simply will not perform these functions, or that out-of-state lawyers can perform them equally well, or that the State can devise less restrictive alternatives for accomplishing these goals. Conclusory second-guessing of difficult legislative decisions, such as the Court resorts to today, is not an attractive way for federal courts to engage in judicial review. Thus, whatever the reality of how much New Hampshire can expect to gain from having the members of its bar reside within that State, the point is that New Hampshire is entitled to believe and hope that its lawyers will provide the various unique services mentioned above, just as it is entitled to believe that the residency requirement is the appropriate way to that end. As noted, some of these services can *only* be provided by lawyers who also are residents. With respect to the other services, the State can reasonably find that lawyers who reside in state are more likely to undertake them.

In addition, I find the Court's "less restrictive means" analysis both ill-advised and potentially unmanageable. Initially I would note, as I and other Members of this Court have before, see *Central Hudson Gas & Elec. Corp.* v. *Public Service Comm'n of New York*, 447 U. S. 557, 599–600 (1980) (REHNQUIST, J., dissenting) (citing *Illinois Elections Bd.* v. *Socialist Workers Party*, 440 U. S. 173, 188–189 (1979) (BLACKMUN, J., concurring)); cf. *Florida* v. *Royer*, 460 U. S. 491, 528–529 (1983) (REHNQUIST, J., dissenting), that such an analysis, when carried too far, will ultimately lead to striking

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point here is different; whether or not lawyers actually wield state powers, the State nevertheless has a substantial interest in having resident lawyers. In *Griffiths* the alien lawyers were state residents. The harms that a State can identify from allowing *nonresident* lawyers to practice are very different from the harms posited in *Griffiths* as arising from allowing *resident alien* lawyers to practice. I note in addition that the standards established for reviewing alienage classifications under the Equal Protection Clause are not equated with the standard of review under the Art. IV Privileges and Immunities Clause.

down almost any statute on the ground that the Court could think of another "less restrictive" way to write it. This approach to judicial review, far more than the usual application of a standard of review, tends to place courts in the position of second-guessing legislators on legislative matters. Surely this is not a consequence to be desired.

In any event, I find the less-restrictive-means analysis, which is borrowed from our First Amendment jurisprudence, to be out of place in the context of the Art. IV Privileges and Immunities Clause. *Toomer* v. *Witsell*, 334 U. S., at 396, and *Hicklin* v. *Orbeck*, 437 U. S. 518, 529–530 (1978), indicate that the means employed by the State should bear a "substantial" or "close relation" to the State's objectives, and they speak in terms of whether the State's approach is "tailored" to its stated goal. This approach perhaps has a place: to the extent that an obvious way to accomplish the State's proffered goal is apparent, the fact that the State did not follow that path may indicate that the State had another, less legitimate goal in mind. But I believe the challenge of a "less restrictive means" should be overcome if merely a legitimate reason exists for not pursuing that path. And in any event courts should not play the game that the Court has played here—independently scrutinizing each asserted state interest to see if it could devise a better way than the State to accomplish that goal. Here the appellee primarily argues that if the State really was concerned about out-of-state lawyers it would not allow those who leave the State after joining the bar to remain members. The answer to this argument was well stated by the dissenting judges in the Court of Appeals for the First Circuit: "[T]he Supreme Court of New Hampshire might have concluded that not many New Hampshire lawyers will both pull up stakes and continue to practice in the state. And it might further believe that the bureaucracy required to keep track of such comings and goings would not be worth the trouble . . . ." 723 F. 2d 110, 122, n. 4 (1983) (opinion of Campbell, C. J., and Breyer, J.).

There is yet another interest asserted by the State that I believe would justify a decision to limit membership in the state bar to state residents. The State argues that out-of-state bar members pose a problem in situations where counsel must be available on short notice to represent clients on unscheduled matters. The Court brushes this argument aside, speculating that "a high percentage of nonresident lawyers willing to take the state bar examination and pay the annual dues will reside in places reasonably convenient to New Hampshire," and suggesting that in any event the trial court could alleviate this problem by requiring the lawyer to retain local counsel. *Ante*, at 286–287. Assuming that the latter suggestion does not itself constitute unlawful discrimination under the Court's test, there nevertheless may be good reasons why a State or a trial court would rather not get into structuring attorney-client relationships by requiring the retention of local counsel for emergency matters. The situation would have to be explained to the client, and the allocation of responsibility between resident and nonresident counsel could cause as many problems as the Court's suggestion might cure.

Nor do I believe that the problem can be confined to emergency matters. The Court admits that even in the ordinary course of litigation a trial judge will want trial lawyers to be available on short notice; the uncertainties of managing a trial docket are such that lawyers rarely are given a single date on which a trial will begin; they may be required to "stand by"—or whatever the local terminology is—for days at a time, and then be expected to be ready in a matter of hours, with witnesses, when the case in front of them suddenly settles. A State reasonably can decide that a trial court should not have added to its present scheduling difficulties the uncertainties and added delays fostered by counsel who might reside 1,000 miles from New Hampshire. If there is any single problem with state legal systems that this Court might consider "substantial," it is the problem of delay in litigation—a subject that has been profusely explored in the literature over the past several years. See, *e. g.*, Attacking Litigation Costs and Delay, Final Report of the Action Commission to Reduce Court Costs and Delay (American Bar Association 1984); S. Wasby, T. Marvell, & A. Aikman, Volume and Delay in State Appellate Courts: Problems and Responses (1979). Surely the State has a substantial interest in taking steps to minimize this problem. Thus, I think that New Hampshire had more than enough "substantial reasons" to conclude that its lawyers should also be its residents. I would hold that the Rule of the New Hampshire Supreme Court does not violate the Privileges and Immunities Clause of Art. IV.

OREGON *v.* ELSTAD

CERTIORARI TO THE COURT OF APPEALS OF OREGON

No. 83–773. Argued October 3, 1984—Decided March 4, 1985

When officers of the Polk County, Ore., Sheriff's Office picked up respondent at his home as a suspect in a burglary, he made an incriminating statement without having been given the warnings required by *Miranda* v. *Arizona,* 384 U. S. 436. After he was taken to the station house, and after he was advised of and waived his *Miranda* rights, respondent executed a written confession. In respondent's subsequent prosecution for burglary, the state trial court excluded from evidence his first statement because he had not been given *Miranda* warnings, but admitted the written confession. Respondent was convicted, but the Oregon Court of Appeals reversed, holding that the confession should also have been excluded. The court concluded that because of the brief period separating respondent's initial, unconstitutionally obtained statement and his subsequent confession, the "cat was sufficiently out of the bag to exert a coercive impact" on respondent's confession, rendering it inadmissible.

Held: The Self-Incrimination Clause of the Fifth Amendment does not require the suppression of a confession, made after proper *Miranda* warnings and a valid waiver of rights, solely because the police had obtained an earlier voluntary but unwarned admission from the suspect. Pp. 303–318.

(a) A procedural *Miranda* violation differs in significant respects from violations of the Fourth Amendment, which have traditionally mandated a broad application of the "fruits" doctrine that requires exclusion as "fruit of the poisonous tree" of evidence discovered as a result of an unconstitutional search. The Fifth Amendment prohibits use by the prosecution in its case in chief only of *compelled* testimony, and failure to administer *Miranda* warnings creates a presumption of compulsion, requiring that unwarned statements that are otherwise voluntary within the meaning of the Fifth Amendment be excluded from evidence. But the *Miranda* presumption does not require that fruits of otherwise voluntary statements be discarded as inherently tainted. It is an unwarranted extension of *Miranda* to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period. Pp. 304–309.

(b) The failure of police to administer *Miranda* warnings does not mean that the statements received have actually been coerced, but only that courts will presume the privilege against compulsory self-incrimination has not been intelligently exercised. Absent deliberate coercion or improper tactics in obtaining an unwarned statement, a careful and thorough administration of *Miranda* warnings cures the condition that rendered the unwarned statement inadmissible. The warnings convey the relevant information, and thereafter the suspect's choice whether to exercise his privilege to remain silent should ordinarily be viewed as an act of free will. Endowing the psychological effects of *voluntary* unwarned admissions—such as the psychological impact of the suspect's conviction that he has "let the cat out of the bag"—with constitutional implications would, practically speaking, disable the police from obtaining the suspect's informed cooperation even when the official coercion proscribed by the Fifth Amendment played no part in either his warned or unwarned confessions. Pp. 309–314.

(c) Respondent knowingly and voluntarily waived his right to remain silent before he executed his written confession, and his earlier statement was voluntary, within the meaning of the Fifth Amendment. Neither the environment nor the manner of either "interrogation" was coercive. To impose a requirement, suggested by respondent, that he should also have been given an additional warning at the station house that his prior statement could not be used against him, is neither practicable nor constitutionally necessary. Pp. 314–317.

(d) The dictates of *Miranda* and the goals of the Fifth Amendment proscription against use of compelled testimony are fully satisfied in the circumstances of this case by barring use of the unwarned statement in the case in chief. No further purpose is served by imputing "taint" to subsequent statements obtained pursuant to a voluntary and knowing waiver. Pp. 317–318.

61 Ore. App. 673, 658 P. 2d 552, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, POWELL and REHNQUIST, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 318. STEVENS, J., filed a dissenting opinion, *post*, p. 364.

David B. Frohnmayer, Attorney General of Oregon, argued the cause for petitioner. With him on the brief were *William F. Gary*, Deputy Attorney General, *James E. Mountain, Jr.*, Solicitor General, and *Thomas H. Denney*, *Virginia L. Linder*, and *Stephen F. Peifer*, Assistant Attorneys General.

Gary D. Babcock argued the cause for respondent. With him on the brief was *Stephen J. Williams.**

JUSTICE O'CONNOR delivered the opinion of the Court.

This case requires us to decide whether an initial failure of law enforcement officers to administer the warnings required by *Miranda* v. *Arizona,* 384 U. S. 436 (1966), without more, "taints" subsequent admissions made after a suspect has been fully advised of and has waived his *Miranda* rights. Respondent, Michael James Elstad, was convicted of burglary by an Oregon trial court. The Oregon Court of Appeals reversed, holding that respondent's signed confession, although voluntary, was rendered inadmissible by a prior remark made in response to questioning without benefit of *Miranda* warnings. We granted certiorari, 465 U. S. 1078 (1984), and we now reverse.

I

In December 1981, the home of Mr. and Mrs. Gilbert Gross, in the town of Salem, Polk County, Ore., was burglarized. Missing were art objects and furnishings valued at $150,000. A witness to the burglary contacted the Polk County Sheriff's Office, implicating respondent Michael Elstad, an 18-year-old neighbor and friend of the Grosses' teenage son. Thereupon, Officers Burke and McAllister went to the home of respondent Elstad, with a warrant for his arrest. Elstad's mother answered the door. She led the officers to her son's room where he lay on his bed, clad in shorts and listening to his stereo. The officers asked him to get dressed and to accompany them into the living room. Officer McAllister asked respondent's mother to step into the kitchen, where he explained that they had a warrant for her son's arrest for the burglary of a neighbor's residence. Officer Burke remained with Elstad in the living room. He later testified:

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*Briefs of *amici curiae* urging reversal were filed for the United States by *Solicitor General Lee, Assistant Attorney General Trott, Deputy Solicitor General Frey,* and *David A. Strauss;* and for Americans for Effective Law Enforcement, Inc., et al. by *Fred E. Inbau, Wayne W. Schmidt, James P. Manak, David Crump,* and *Daniel B. Hales.*

> "I sat down with Mr. Elstad and I asked him if he was aware of why Detective McAllister and myself were there to talk with him. He stated no, he had no idea why we were there. I then asked him if he knew a person by the name of Gross, and he said yes, he did, and also added that he heard that there was a robbery at the Gross house. And at that point I told Mr. Elstad that I felt he was involved in that, and he looked at me and stated, 'Yes, I was there.'" App. 19–20.

The officers then escorted Elstad to the back of the patrol car. As they were about to leave for the Polk County Sheriff's office, Elstad's father arrived home and came to the rear of the patrol car. The officers advised him that his son was a suspect in the burglary. Officer Burke testified that Mr. Elstad became quite agitated, opened the rear door of the car and admonished his son: "I told you that you were going to get into trouble. You wouldn't listen to me. You never learn." *Id.*, at 21.

Elstad was transported to the Sheriff's headquarters and approximately one hour later, Officers Burke and McAllister joined him in McAllister's office. McAllister then advised respondent for the first time of his *Miranda* rights, reading from a standard card. Respondent indicated he understood his rights, and, having these rights in mind, wished to speak with the officers. Elstad gave a full statement, explaining that he had known that the Gross family was out of town and had been paid to lead several acquaintances to the Gross residence and show them how to gain entry through a defective sliding glass door. The statement was typed, reviewed by respondent, read back to him for correction, initialed and signed by Elstad and both officers. As an afterthought, Elstad added and initialed the sentence, "After leaving the house Robby & I went back to [the] van & Robby handed me a small bag of grass." App. 42. Respondent concedes that the officers made no threats or promises either at his residence or at the Sheriff's office.

Respondent was charged with first-degree burglary. He was represented at trial by retained counsel. Elstad waived his right to a jury, and his case was tried by a Circuit Court Judge. Respondent moved at once to suppress his oral statement and signed confession. He contended that the statement he made in response to questioning at his house "let the cat out of the bag," citing *United States* v. *Bayer*, 331 U. S. 532 (1947), and tainted the subsequent confession as "fruit of the poisonous tree," citing *Wong Sun* v. *United States*, 371 U. S. 471 (1963). The judge ruled that the statement, "I was there," had to be excluded because the defendant had not been advised of his *Miranda* rights. The written confession taken after Elstad's arrival at the Sheriff's office, however, was admitted in evidence. The court found:

> "[H]is written statement was given freely, voluntarily and knowingly by the defendant after he had waived his right to remain silent and have counsel present which waiver was evidenced by the card which the defendant had signed. [It] was not tainted in any way by the previous brief statement between the defendant and the Sheriff's Deputies that had arrested him." App. 45.

Elstad was found guilty of burglary in the first degree. He received a 5-year sentence and was ordered to pay $18,000 in restitution.

Following his conviction, respondent appealed to the Oregon Court of Appeals, relying on *Wong Sun* and *Bayer*. The State conceded that Elstad had been in custody when he made his statement, "I was there," and accordingly agreed that this statement was inadmissible as having been given without the prescribed *Miranda* warnings. But the State maintained that any conceivable "taint" had been dissipated prior to the respondent's written confession by McAllister's careful administration of the requisite warnings. The Court of Appeals reversed respondent's conviction, identifying the crucial constitutional inquiry as "whether there was a sufficient break in the stream of events between [the] inadmissible statement and the written confession to insulate the latter statement from the effect of what went before." 61 Ore. App. 673, 676, 658 P. 2d 552, 554 (1983). The Oregon court concluded:

> "Regardless of the absence of actual compulsion, the coercive impact of the unconstitutionally obtained statement remains, because in a defendant's mind it has sealed his fate. It is this impact that must be dissipated in order to make a subsequent confession admissible. In determining whether it has been dissipated, lapse of time, and change of place from the original surroundings are the most important considerations." *Id.*, at 677, 658 P. 2d, at 554.

Because of the brief period separating the two incidents, the "cat was sufficiently out of the bag to exert a coercive impact on [respondent's] later admissions." *Id.*, at 678, 658 P. 2d, at 555.

The State of Oregon petitioned the Oregon Supreme Court for review, and review was declined. This Court granted certiorari to consider the question whether the Self-Incrimination Clause of the Fifth Amendment requires the suppression of a confession, made after proper *Miranda* warnings and a valid waiver of rights, solely because the police had obtained an earlier voluntary but unwarned admission from the defendant.

II

The arguments advanced in favor of suppression of respondent's written confession rely heavily on metaphor. One metaphor, familiar from the Fourth Amendment context, would require that respondent's confession, regardless of its integrity, voluntariness, and probative value, be suppressed as the "tainted fruit of the poisonous tree" of the *Miranda* violation. A second metaphor questions whether a confession can be truly voluntary once the "cat is out of the bag." Taken out of context, each of these metaphors can be misleading. They should not be used to obscure fundamental differences between the role of the Fourth Amendment exclusionary rule and the function of *Miranda* in guarding against the prosecutorial use of compelled statements as prohibited by the Fifth Amendment. The Oregon court assumed and respondent here contends that a failure to administer *Miranda* warnings necessarily breeds the same consequences as police infringement of a constitutional right, so that evidence uncovered following an unwarned statement must be suppressed as "fruit of the poisonous tree." We believe this view misconstrues the nature of the protections afforded by *Miranda* warnings and therefore misreads the consequences of police failure to supply them.

A

Prior to *Miranda*, the admissibility of an accused's in-custody statements was judged solely by whether they were "voluntary" within the meaning of the Due Process Clause. See, *e. g.*, *Haynes* v. *Washington*, 373 U. S. 503 (1963); *Chambers* v. *Florida*, 309 U. S. 227 (1940). If a suspect's statements had been obtained by "techniques and methods offensive to due process," *Haynes* v. *Washington*, 373 U. S., at 515, or under circumstances in which the suspect clearly had no opportunity to exercise "a free and unconstrained will," *id.*, at 514, the statements would not be admitted. The Court in *Miranda* required suppression of many statements that would have been admissible under traditional due process analysis by presuming that statements made while in custody and without adequate warnings were protected by the Fifth Amendment. The Fifth Amendment, of course, is not concerned with nontestimonial evidence. See *Schmerber* v. *California*, 384 U. S. 757, 764 (1966) (defendant may be compelled to supply blood samples). Nor is it concerned with moral and psychological pressures to confess emanating from sources other than official coercion. See, *e. g.*, *California* v. *Beheler*, 463 U. S. 1121, 1125, and n. 3 (1983) *(per curiam)*; *Rhode Island* v. *Innis*, 446 U. S. 291, 303, and n. 10 (1980); *Oregon* v. *Mathiason*, 429 U. S. 492, 495–496 (1977). Voluntary statements "remain a proper element in law enforcement." *Miranda* v. *Arizona*, 384 U. S., at 478. "Indeed, far from being prohibited by the Constitution, admissions of guilt by wrongdoers, if not coerced, are inherently desirable. . . . Absent some officially coerced self-accusation, the Fifth Amendment privilege is not violated by even the most damning admissions." *United States* v. *Washington*, 431 U. S. 181, 187 (1977). As the Court noted last Term in *New York* v. *Quarles*, 467 U. S. 649, 654 (1984) (footnote omitted):

> "The *Miranda* Court, however, presumed that interrogation in certain custodial circumstances is inherently coercive and . . . that statements made under those circumstances are inadmissible unless the suspect is specifically informed of his *Miranda* rights and freely decides to forgo those rights. The prophylactic *Miranda* warnings therefore are 'not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected.' *Michigan* v. *Tucker*, 417 U. S. 433, 444 (1974); see *Edwards* v. *Arizona*, 451 U. S. 477, 492 (1981) (POWELL, J., concurring). Requiring *Miranda* warnings before custodial interrogation provides 'practical reinforcement' for the Fifth Amendment right."

Respondent's contention that his confession was tainted by the earlier failure of the police to provide *Miranda* warnings and must be excluded as "fruit of the poisonous tree" assumes the existence of a constitutional violation. This figure of speech is drawn from *Wong Sun* v. *United States*, 371 U. S. 471 (1963), in which the Court held that evidence and witnesses discovered as a result of a search in violation of the Fourth Amendment must be excluded from evidence. The *Wong Sun* doctrine applies as well when the fruit of the Fourth Amendment violation is a confession. It is settled law that "a confession obtained through custodial interrogation after an illegal arrest should be excluded unless intervening events break the causal connection between the illegal arrest and the confession so that the confession is 'sufficiently an act of free will to purge the primary taint.'" *Taylor* v. *Alabama*, 457 U. S. 687, 690 (1982) (quoting *Brown* v. *Illinois*, 422 U. S. 590, 602 (1975)).

But as we explained in *Quarles* and *Tucker*, a procedural *Miranda* violation differs in significant respects from violations of the Fourth Amendment, which have traditionally mandated a broad application of the "fruits" doctrine. The purpose of the Fourth Amendment exclusionary rule is to deter unreasonable searches, no matter how probative their fruits. *Dunaway* v. *New York*, 442 U. S. 200, 216–217 (1979); *Brown* v. *Illinois*, 422 U. S., at 600–602. "The exclusionary rule, . . . when utilized to effectuate the Fourth Amendment, serves interests and policies that are distinct from those it serves under the Fifth." *Id.*, at 601. Where a Fourth Amendment violation "taints" the confession, a finding of voluntariness for the purposes of the Fifth Amendment is merely a threshold requirement in determining whether the confession may be admitted in evidence. *Taylor* v. *Alabama*, *supra*, at 690. Beyond this, the prosecution must show a sufficient break in events to undermine the inference that the confession was caused by the Fourth Amendment violation.

The *Miranda* exclusionary rule, however, serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself. It may be triggered even in the absence of a Fifth Amendment violation.[1] The Fifth Amendment prohibits use by the prosecution in its case in chief only of *compelled* testimony. Failure to administer *Miranda* warnings creates a presumption of compulsion. Consequently, unwarned statements that are otherwise voluntary within the meaning of the Fifth Amendment must nevertheless be excluded from evidence under *Miranda*. Thus, in the individual case, *Miranda*'s preventive medicine provides a remedy even to the defendant who has suffered no identifiable constitutional harm. See *New York* v. *Quarles*, *supra*, at 654; *Michigan* v. *Tucker*, 417 U. S. 433, 444 (1974).

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[1] JUSTICE STEVENS expresses puzzlement at our statement that a simple failure to administer *Miranda* warnings is not in itself a violation of the Fifth Amendment. Yet the Court so held in *New York* v. *Quarles*, 467

But the *Miranda* presumption, though irrebuttable for purposes of the prosecution's case in chief, does not require that the statements and their fruits be discarded as inherently tainted. Despite the fact that patently *voluntary* statements taken in violation of *Miranda* must be excluded from the prosecution's case, the presumption of coercion does not bar their use for impeachment purposes on cross-examination. *Harris* v. *New York*, 401 U. S. 222 (1971). The Court in *Harris* rejected as an "extravagant extension of the Constitution," the theory that a defendant who had confessed under circumstances that made the confession inadmissible, could thereby enjoy the freedom to "deny every fact disclosed or discovered as a 'fruit' of his confession, free from confrontation with his prior statements" and that the voluntariness of his confession would be totally irrelevant. *Id.*, at 225, and n. 2. Where an unwarned statement is preserved for use in situations that fall outside the sweep of the *Miranda* presumption, "the primary criterion of admissibility

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U. S. 649, 654 (1983), and *Michigan* v. *Tucker*, 417 U. S. 433, 444 (1974). The *Miranda* Court itself recognized this point when it disclaimed any intent to create a "constitutional straitjacket" and invited Congress and the States to suggest "potential alternatives for protecting the privilege." 384 U. S., at 467. A *Miranda* violation does not *constitute* coercion but rather affords a bright-line, legal presumption of coercion, requiring suppression of all unwarned statements. It has never been remotely suggested that any statement taken from Mr. Elstad without benefit of *Miranda* warnings would be admissible.

[remains] the 'old' due process voluntariness test." Schulhofer, Confessions and the Court, 79 Mich. L. Rev. 865, 877 (1981).

In *Michigan* v. *Tucker, supra,* the Court was asked to extend the *Wong Sun* fruits doctrine to suppress the testimony of a witness for the prosecution whose identity was discovered as the result of a statement taken from the accused without benefit of full *Miranda* warnings. As in respondent's case, the breach of the *Miranda* procedures in *Tucker* involved no actual compulsion. The Court concluded that the unwarned questioning "did not abridge respondent's constitutional privilege . . . but departed only from the prophylactic standards later laid down by this Court in *Miranda* to safeguard that privilege." 417 U. S., at 446. Since there was no actual infringement of the suspect's constitutional rights, the case was not controlled by the doctrine expressed in *Wong Sun* that fruits of a constitutional violation must be suppressed. In deciding "how sweeping the judicially imposed consequences" of a failure to administer *Miranda* warnings should be, 417 U. S., at 445, the *Tucker* Court noted that neither the general goal of deterring improper police conduct nor the Fifth Amendment goal of assuring trustworthy evidence would be served by suppression of the witness' testimony. The unwarned confession must, of course, be suppressed, but the Court ruled that introduction of the third-party witness' testimony did not violate Tucker's Fifth Amendment rights.

We believe that this reasoning applies with equal force when the alleged "fruit" of a noncoercive *Miranda* violation is neither a witness nor an article of evidence but the accused's own voluntary testimony. As in *Tucker*, the absence of any coercion or improper tactics undercuts the twin rationales—trustworthiness and deterrence—for a broader rule. Once warned, the suspect is free to exercise his own volition in deciding whether or not to make a statement to the authorities. The Court has often noted: "'[A] living witness is not to be mechanically equated with the proffer of inanimate evidentiary objects illegally seized. . . . [T]he living witness is an individual human personality whose attributes of will, perception, memory and *volition* interact to determine what testimony he will give.'" *United States* v. *Ceccolini*, 435 U. S. 268, 277 (1978) (emphasis added) (quoting from *Smith* v. *United States*, 117 U. S. App. D. C. 1, 3–4, 324 F. 2d 879, 881–882 (1963) (Burger, J.) (footnotes omitted), cert. denied, 377 U. S. 954 (1964)).

Because *Miranda* warnings may inhibit persons from giving information, this Court has determined that they need be administered only after the person is taken into "custody" or his freedom has otherwise been significantly restrained. *Miranda* v. *Arizona*, 384 U. S., at 478. Unfortunately, the task of defining "custody" is a slippery one, and "policemen investigating serious crimes [cannot realistically be expected to] make no errors whatsoever." *Michigan* v. *Tucker*, *supra*, at 446. If errors are made by law enforcement officers in administering the prophylactic *Miranda* procedures, they should not breed the same irremediable consequences as police infringement of the Fifth Amendment itself. It is an unwarranted extension of *Miranda* to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period. Though *Miranda* requires that the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made.

B

The Oregon court, however, believed that the unwarned remark compromised the voluntariness of respondent's later confession. It was the court's view that the prior *answer* and not the unwarned questioning impaired respondent's ability to give a valid waiver and that only lapse of time and change of place could dissipate what it termed the "coercive impact" of the inadmissible statement. When a prior statement is actually coerced, the time that passes between confessions, the change in place of interrogations, and the change in identity of the interrogators all bear on whether that coercion has carried over into the second confession. See *Westover* v. *United States*, decided together with *Miranda* v. *Arizona*, 384 U. S., at 494; *Clewis* v. *Texas*, 386 U. S. 707 (1967). The failure of police to administer *Miranda* warnings does not mean that the statements received have actually been coerced, but only that courts will presume the privilege against compulsory self-incrimination has not been intelligently exercised. See *New York* v. *Quarles*, 467 U. S., at 654, and n. 5; *Miranda* v. *Arizona*, *supra*, at 457. Of the courts that have considered whether a properly warned confession must be suppressed because it was preceded by an unwarned but clearly voluntary admission, the majority have explicitly or implicitly recognized that *Westover*'s requirement of a break in the stream of events is inapposite.[2] In these circumstances, a careful and thorough administration of *Miranda* warnings serves to cure the condition that rendered the unwarned statement inadmissible. The warning conveys the relevant information and thereafter the suspect's choice whether to exercise his privilege to remain silent should ordinarily be viewed as an "act of free will." *Wong Sun* v. *United States*, 371 U. S., at 486.

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[2] See, *e. g.*, *United States* v. *Bowler*, 561 F. 2d 1323, 1326 (CA9 1977); *Tanner* v. *Vincent*, 541 F. 2d 932 (CA2 1976); *United States* v. *Toral*, 536 F. 2d 893, 896–897 (CA9 1976); *United States* v. *Knight*, 395 F. 2d 971, 975 (CA2 1968); *State* v. *Montes*, 136 Ariz. 491, 496–497, 667 P. 2d 191, 196–197 (1983); *State* v. *Derrico*, 181 Conn. 151, 166–167, 434 A. 2d 356, 365–366, cert. denied, 449 U. S. 1064 (1980); *State* v. *Holt*, 354 So. 2d 888, 890 (Fla. App.), cert. denied, 361 So. 2d 832 (Fla. 1978); *Fried* v. *State*, 42 Md. App. 643, 644–648, 402 A. 2d 101, 102–104 (1979); *Commonwealth* v. *White*, 353 Mass. 409, 232 N. E. 2d 335 (1967); *State* v. *Sickels*, 275 N. W. 2d 809, 813–814 (Minn. 1979); *State* v. *Dakota*, 300 Minn. 12, 217 N. W. 2d 748 (1974); *State* v. *Raymond*, 305 Minn. 160, 170, 232 N. W. 2d 879, 886 (1975) (noting common thread in line of cases holding prejudicial coercion not present "just because [defendant] had made an earlier confession which 'let the cat out of the bag'"); *Commonwealth* v. *Chacko*, 500 Pa. 571, 580–582, 459 A. 2d 311, 316 (1983) ("After being given his *Miranda* warnings it is clear [defendant] maintained his intention to provide his questioners with

The Oregon court nevertheless identified a subtle form of lingering compulsion, the psychological impact of the suspect's conviction that he has let the cat out of the bag and, in so doing, has sealed his own fate. But endowing the psychological effects of *voluntary* unwarned admissions with constitutional implications would, practically speaking, disable the police from obtaining the suspect's informed cooperation even when the official coercion proscribed by the Fifth Amendment played no part in either his warned or unwarned confessions. As the Court remarked in *Bayer:*

> "[A]fter an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession may always be looked upon as fruit of the first. But this Court has never gone so far as to hold that making a confession under circumstances which preclude its use, perpetually disables the confessor from making a usable one after those conditions have been removed." 331 U. S., at 540–541.

Even in such extreme cases as *Lyons* v. *Oklahoma*, 322 U. S. 596 (1944), in which police forced a full confession from the accused through unconscionable methods of interrogation, the Court has assumed that the coercive effect of the confes-

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his version of the incident"). But see *In re Pablo A. C.*, 129 Cal. App. 3d 984, 181 Cal. Rptr. 468 (1982); *State* v. *Hibdon*, 57 Ore. App. 509, 645 P. 2d 580 (1982); *State* v. *Lavaris*, 99 Wash. 2d 851, 857–860, 664 P. 2d 1234, 1237–1239 (1983).

sion could, with time, be dissipated. See also *Westover* v. *United States*, *supra*, at 496.

This Court has never held that the psychological impact of voluntary disclosure of a guilty secret qualifies as state compulsion or compromises the voluntariness of a subsequent informed waiver. The Oregon court, by adopting this expansive view of Fifth Amendment compulsion, effectively immunizes a suspect who responds to pre-*Miranda* warning questions from the consequences of his subsequent informed waiver of the privilege of remaining silent. See 61 Ore. App., at 679, 658 P. 2d, at 555 (Gillette, P. J., concurring). This immunity comes at a high cost to legitimate law enforcement activity, while adding little desirable protection to the individual's interest in not being *compelled* to testify against himself. Cf. *Michigan* v. *Mosley*, 423 U. S. 96, 107–111 (1975) (WHITE, J., concurring in result). When neither the initial nor the subsequent admission is coerced, little justification exists for permitting the highly probative evidence of a voluntary confession to be irretrievably lost to the factfinder.

There is a vast difference between the direct consequences flowing from coercion of a confession by physical violence or other deliberate means calculated to break the suspect's will and the uncertain consequences of disclosure of a "guilty secret" freely given in response to an unwarned but noncoercive question, as in this case. JUSTICE BRENNAN's contention that it is impossible to perceive any causal distinction between this case and one involving a confession that is coerced by torture is wholly unpersuasive.[3] Certainly, in respondent's case, the causal connection between any psychological disadvantage created by his admission and his ultimate decision to cooperate is speculative and attenuated at

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[3] Most of the 50 cases cited by JUSTICE BRENNAN in his discussion of consecutive confessions concern an initial unwarned statement obtained through overtly or inherently coercive methods which raise serious Fifth Amendment and due process concerns. Without describing each case cited, the following are representative of the situations JUSTICE BRENNAN views as analogous to this case: *e. g.*, *Darwin* v. *Connecticut*, 391 U. S. 346 (1968) (suspect interrogated for 48 hours incommunicado while officers denied access to counsel); *Beecher* v. *Alabama*, 389 U. S. 35, 36 (1967) (officer fired rifle next to suspect's ear and said "If you don't tell the truth I am

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going to kill you"); *Clewis* v. *Texas*, 386 U. S. 707 (1967) (suspect was arrested without probable cause, interrogated for nine days with little food or sleep, and gave three unwarned "confessions" each of which he immediately retracted); *Reck* v. *Pate*, 367 U. S. 433, 439–440, n. 3 (1961) (mentally retarded youth interrogated incommunicado for a week "during which time he was frequently ill, fainted several times, vomited blood on the floor of the police station and was twice taken to the hospital on a stretcher"). Typical of the state cases cited in the dissent's discussion are: *e. g., Cagle* v. *State*, 45 Ala. App. 3, 4, 221 So. 2d 119, 120 (1969) (police interrogated wounded suspect at police station for one hour before obtaining statement, took him to hospital to have his severe wounds treated, only then giving the *Miranda* warnings; suspect prefaced second statement with "I have already give the Chief a statement and I might as well give one to you, too"), cert. denied, 284 Ala. 727, 221 So. 2d 121 (1969); *People* v. *Saiz*, 620 P. 2d 15 (Colo. 1980) (two hours' unwarned custodial interrogation of 16-year-old in violation of state law requiring parent's presence, culminating in visit to scene of crime); *People* v. *Bodner*, 75 App. Div. 2d 440, 430 N. Y. S. 2d 433 (1980) (confrontation at police station and at scene of crime between police and retarded youth with mental age of eight or nine); *State* v. *Badger*, 141 Vt. 430, 441, 450 A. 2d 336, 343 (1982) (unwarned "close and intense" station house questioning of 15-year-old, including threats and promises, resulted in confession at 1:20 a. m.; court held "[w]arnings . . . were insufficient to cure such blatant abuse or compensate for the coercion in this case").

JUSTICE BRENNAN cannot seriously mean to equate such situations with the case at bar. Likewise inapposite are the cases the dissent cites concerning suspects whose invocation of their rights to remain silent and to have counsel present were flatly ignored while police subjected them to continued interrogation. See, *e. g., United States ex rel. Sanders* v. *Rowe*, 460 F. Supp. 1128 (ND Ill. 1978); *People* v. *Braeseke*, 25 Cal. 3d 691, 602 P. 2d 384 (1979), vacated on other grounds, 446 U. S. 932 (1980); *Smith* v. *State*, 132 Ga. App. 491, 208 S. E. 2d 351 (1974). Finally, many of the decisions JUSTICE BRENNAN claims require that the "taint" be "dissipated" simply recite the stock "cat" and "tree" metaphors but go on to find the second confession voluntary without identifying any break in the stream of events beyond the simple administration of a careful and thorough warning. See cases cited in n. 2, *supra*.

Out of the multitude of decisions JUSTICE BRENNAN cites, no more than half a dozen fairly can be said to suppress confessions on facts remotely best. It is difficult to tell with certainty what motivates a suspect to speak. A suspect's confession may be traced to factors as disparate as "a prearrest event such as a visit with a minister," *Dunaway* v. *New York*, 442 U. S., at 220 (STEVENS, J., concurring), or an intervening event such as the exchange of words respondent had with his father. We must conclude that, absent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion. A subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement. In such circumstances, the finder of fact may reasonably conclude that the suspect made a rational and intelligent choice whether to waive or invoke his rights.

III

Though belated, the reading of respondent's rights was undeniably complete. McAllister testified that he read the *Miranda* warnings aloud from a printed card and recorded

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comparable to those in the instant case, and some of these decisions involved other elements not present here. See *United States* v. *Pierce*, 397 F. 2d 128 (CA4 1968) (thorough custodial interrogation at station house); *United States* v. *Pellegrini*, 309 F. Supp. 250, 257 (SDNY 1970) (officers induced unwarned suspect to produce "the clinching evidence of his crime"); *In re Pablo A. C.*, 129 Cal. App. 3d 984, 181 Cal. Rptr. 468 (1982) (25-minute interrogation of juvenile; court finds causal connection but notes that all prior cited cases relying on "cat-out-of-bag" theory have involved coercion); *State* v. *Lekas*, 201 Kan. 579, 442 P. 2d 11 (1968) (parolee taken into custody and questioned at courthouse). At least one State Supreme Court cited by JUSTICE BRENNAN that read *Miranda* as mandating suppression of a subsequent voluntary and fully warned confession did so with express reluctance, convinced that admissibility of a subsequent confession should turn on voluntariness alone. See *Brunson* v. *State*, 264 So. 2d 817, 819–820 (Miss. 1972).

Elstad's responses.[4] There is no question that respondent knowingly and voluntarily waived his right to remain silent before he described his participation in the burglary. It is also beyond dispute that respondent's earlier remark was voluntary, within the meaning of the Fifth Amendment. Neither the environment nor the manner of either "interrogation" was coercive. The initial conversation took place at midday, in the living room area of respondent's own home, with his mother in the kitchen area, a few steps away. Although in retrospect the officers testified that respondent was then in custody, at the time he made his statement he had not been informed that he was under arrest. The arresting officers' testimony indicates that the brief stop in the living room before proceeding to the station house was not to interrogate the suspect but to notify his mother of the reason for his arrest. App. 9–10.

The State has conceded the issue of custody and thus we must assume that Burke breached *Miranda* procedures in failing to administer *Miranda* warnings before initiating the discussion in the living room. This breach may have been the result of confusion as to whether the brief exchange qualified as "custodial interrogation" or it may simply have reflected Burke's reluctance to initiate an alarming police procedure before McAllister had spoken with respondent's mother. Whatever the reason for Burke's oversight, the incident had none of the earmarks of coercion. See *Rawlings* v. *Kentucky*, 448 U. S. 98, 109–110 (1980). Nor did the officers exploit the unwarned admission to pressure respondent into waiving his right to remain silent.

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[4] The *Miranda* advice on the card was clear and comprehensive, incorporating the warning that any statements could be used in a court of law; the rights to remain silent, consult an attorney at state expense, and interrupt the conversation at any time; and the reminder that any statements must be voluntary. The reverse side of the card carried three questions in boldface and recorded Elstad's responses:

"DO YOU UNDERSTAND THESE RIGHTS? 'Yeh'
"DO YOU HAVE ANY QUESTIONS ABOUT YOUR RIGHTS? 'No'
"HAVING THESE RIGHTS IN MIND, DO YOU WISH TO TALK TO US NOW? 'Yeh I do!'"

The card is dated and signed by respondent and by Officer McAllister. A recent high school graduate, Elstad was fully capable of understanding this careful administering of *Miranda* warnings.

Respondent, however, has argued that he was unable to give a fully *informed* waiver of his rights because he was unaware that his prior statement could not be used against him. Respondent suggests that Officer McAllister, to cure this deficiency, should have added an additional warning to those given him at the Sheriff's office. Such a requirement is neither practicable nor constitutionally necessary. In many cases, a breach of *Miranda* procedures may not be identified as such until long after full *Miranda* warnings are administered and a valid confession obtained. See, *e. g.*, *United States* v. *Bowler*, 561 F. 2d 1323, 1324–1325 (CA9 1977) (certain statements ruled inadmissible by trial court); *United States* v. *Toral*, 536 F. 2d 893, 896 (CA9 1976); *United States* v. *Knight*, 395 F. 2d 971, 974–975 (CA2 1968) (custody unclear). The standard *Miranda* warnings explicitly inform the suspect of his right to consult a lawyer before speaking. Police officers are ill-equipped to pinch-hit for counsel, construing the murky and difficult questions of when "custody" begins or whether a given unwarned statement will ultimately be held admissible. See *Tanner* v. *Vincent*, 541 F. 2d 932, 936 (CA2 1976), cert. denied, 429 U. S. 1065 (1977).

This Court has never embraced the theory that a defendant's ignorance of the full consequences of his decisions vitiates their voluntariness. See *California* v. *Beheler*, 463 U. S., at 1125–1126, n. 3; *McMann* v. *Richardson*, 397 U. S. 759, 769 (1970). If the prosecution has actually violated the defendant's Fifth Amendment rights by introducing an inadmissible confession at trial, compelling the defendant to testify in rebuttal, the rule announced in *Harrison* v. *United States*, 392 U. S. 219 (1968), precludes use of that testimony on retrial. "Having 'released the spring' by using the petitioner's unlawfully obtained confessions against him, the Government must show that its illegal action did not induce his testimony." *Id.*, at 224–225. But the Court has refused to find that a defendant who confesses, after being falsely told that his codefendant has turned State's evidence, does so involuntarily. *Frazier* v. *Cupp*, 394 U. S. 731, 739 (1969). The Court has also rejected the argument that a defendant's ignorance that a prior coerced confession could not be admitted in evidence compromised the voluntariness of his guilty plea. *McMann* v. *Richardson, supra,* at 769. Likewise, in *California* v. *Beheler, supra,* the Court declined to accept defendant's contention that, because he was unaware of the potential adverse consequences of statements he made to the police, his participation in the interview was involuntary. Thus we have not held that the *sine qua non* for a knowing and voluntary waiver of the right to remain silent is a full and complete appreciation of all of the consequences flowing from the nature and the quality of the evidence in the case.

IV

When police ask questions of a suspect in custody without administering the required warnings, *Miranda* dictates that the answers received be presumed compelled and that they be excluded from evidence at trial in the State's case in chief. The Court has carefully adhered to this principle, permitting a narrow exception only where pressing public safety concerns demanded. See *New York* v. *Quarles*, 467 U. S., at 655–656. The Court today in no way retreats from the bright-line rule of *Miranda*. We do not imply that good faith excuses a failure to administer *Miranda* warnings; nor do we condone inherently coercive police tactics or methods offensive to due process that render the initial admission involuntary and undermine the suspect's will to invoke his rights once they are read to him. A handful of courts have, however, applied our precedents relating to confessions obtained under coercive circumstances to situations involving wholly voluntary admissions, requiring a passage of time or break in events before a second, fully warned statement can be deemed voluntary. Far from establishing a rigid rule, we direct courts to avoid one; there is no warrant for presuming coercive effect where the suspect's initial inculpatory statement, though technically in violation of *Miranda*, was voluntary.[5] The relevant inquiry is whether, in fact, the second statement was also voluntarily made. As in any such inquiry, the finder of fact must examine the surrounding circumstances and the entire course of police conduct with respect to the suspect in evaluating the voluntariness of his statements. The fact that a suspect chooses to speak after being informed of his rights is, of course, highly probative. We find that the dictates of *Miranda* and the goals of the Fifth Amendment proscription against use of compelled testimony are fully satisfied in the circumstances of this case by barring use of the unwarned statement in the case in chief. No further purpose is served by imputing "taint" to subsequent statements obtained pursuant to a voluntary and knowing waiver. We hold today that a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings.

The judgment of the Court of Appeals of Oregon is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

The Self-Incrimination Clause of the Fifth Amendment guarantees every individual that, if taken into official custody, he shall be informed of important constitutional rights and be given the opportunity knowingly and voluntarily to waive those rights before being interrogated about suspected wrongdoing. *Miranda* v. *Arizona,* 384 U. S. 436 (1966).[1] This guarantee embodies our society's conviction that "no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights." *Escobedo* v. *Illinois*, 378 U. S. 478, 490 (1964).

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[5] JUSTICE BRENNAN, with an apocalyptic tone, heralds this opinion as dealing a "crippling blow to *Miranda*." *Post*, at 319. JUSTICE BRENNAN not only distorts the reasoning and holding of our decision, but, worse, invites trial courts and prosecutors to do the same.

Even while purporting to reaffirm these constitutional guarantees, the Court has engaged of late in a studied campaign to strip the *Miranda* decision piecemeal and to undermine the rights *Miranda* sought to secure. Today's decision not only extends this effort a further step, but delivers a potentially crippling blow to *Miranda* and the ability of courts to safeguard the rights of persons accused of crime. For at least with respect to successive confessions, the Court today appears to strip remedies for *Miranda* violations of the "fruit of the poisonous tree" doctrine prohibiting the use of evidence presumptively derived from official illegality.[2]

Two major premises undergird the Court's decision. The Court rejects as nothing more than "speculative" the long-recognized presumption that an illegally extracted confession causes the accused to confess again out of the mistaken belief that he already has sealed his fate, and it condemns as "'extravagant'" the requirement that the prosecution affirmatively rebut the presumption before the subsequent confession may be admitted. *Ante*, at 307, 313. The Court instead adopts a new rule that, so long as the accused is given the usual *Miranda* warnings before further interrogation, the taint of a previous confession obtained in violation of *Miranda* "ordinarily" must be viewed as *automatically* dissipated. *Ante*, at 311.

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[1] "Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently." 384 U. S., at 444.

[2] The Court repeatedly casts its analysis in terms of the "fruits" of a *Miranda* violation, see *ante,* at 306, 307, 308, but its dicta nevertheless surely should not be read as necessarily foreclosing application of derivative-evidence rules where the *Miranda* violation produces evidence other than a subsequent confession by the accused. See n. 29, *infra.*

In the alternative, the Court asserts that neither the Fifth Amendment itself nor the judicial policy of deterring illegal police conduct requires the suppression of the "fruits" of a confession obtained in violation of *Miranda*, reasoning that to do otherwise would interfere with "legitimate law enforcement activity." *Ante*, at 312. As the Court surely understands, however, "[t]o forbid the direct use of methods . . . but to put no curb on their full indirect use would only invite the very methods deemed 'inconsistent with ethical standards and destructive of personal liberty.'" *Nardone* v. *United States*, 308 U. S. 338, 340 (1939). If violations of constitutional rights may not be remedied through the well-established rules respecting derivative evidence, as the Court has held today, there is a critical danger that the rights will be rendered nothing more than a mere "form of words." *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, 392 (1920).

The Court's decision says much about the way the Court currently goes about implementing its agenda. In imposing its new rule, for example, the Court mischaracterizes our precedents, obfuscates the central issues, and altogether ignores the practical realities of custodial interrogation that have led nearly every lower court to reject its simplistic reasoning. Moreover, the Court adopts startling and unprecedented methods of construing constitutional guarantees. Finally, the Court reaches out once again to address issues not before us. For example, although the State of Oregon has conceded that the arresting officers broke the law in this case, the Court goes out of its way to suggest that they may have been objectively justified in doing so.

Today's decision, in short, threatens disastrous consequences far beyond the outcome in this case. As the Court has not seen fit to provide a full explanation for this result, I believe it essential to consider in detail the premises, reasoning, and implications of the Court's opinion.

I

The threshold question is this: What effect should an admission or confession of guilt obtained in violation of an accused's *Miranda* rights be presumed to have upon the voluntariness of subsequent confessions that are preceded by *Miranda* warnings? Relying on the "cat out of the bag" analysis of *United States* v. *Bayer*, 331 U. S. 532, 540–541 (1947), the Oregon Court of Appeals held that the first confession presumptively taints subsequent confessions in such circumstances. 61 Ore. App. 673, 676, 658 P. 2d 552, 554 (1983). On the specific facts of this case, the court below found that the prosecution had not rebutted this presumption. Rather, given the temporal proximity of Elstad's second confession to his first and the absence of any significant intervening circumstances, the court correctly concluded that there had not been "a sufficient break in the stream of events between [the] inadmissible statement and the written confession to insulate the latter statement from the effect of what went before." *Ibid.*

If this Court's reversal of the judgment below reflected mere disagreement with the Oregon court's application of the "cat out of the bag" presumption to the particular facts of this case, the outcome, while clearly erroneous, would be of little lasting consequence. But the Court rejects the "cat out of the bag" presumption *entirely* and instead adopts a new rule presuming that "ordinarily" there is *no* causal connection between a confession extracted in violation of *Miranda* and a subsequent confession preceded by the usual *Miranda* warnings. *Ante*, at 311, 314. The Court suggests that it is merely following settled lower-court practice in adopting this rule and that the analysis followed by the Oregon Court of Appeals was aberrant. This is simply not so. Most federal courts have rejected the Court's approach and instead held that (1) there is a rebuttable presumption that a confession obtained in violation of *Miranda* taints subsequent confessions, and (2) the taint cannot be dissipated solely by giving *Miranda* warnings.[3] Moreover, those few federal courts that have suggested approaches similar to the Court's have subsequently qualified their positions.[4] Even more significant is the case among state courts. Although a handful have adopted the Court's approach,[5] the overwhelming majority of state courts that have considered the issue have concluded that subsequent confessions are presumptively tainted by a first confession taken in violation of *Miranda* and that *Miranda* warnings alone cannot dissipate the taint.[6]

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[3] See, *e. g.*, *United States* v. *Lee*, 699 F. 2d 466, 468–469 (CA9 1982); *United States* v. *Nash*, 563 F. 2d 1166, 1169 (CA5 1977); *Randall* v. *Estelle*, 492 F. 2d 118, 120 (CA5 1974); *Fisher* v. *Scafati*, 439 F. 2d 307, 311 (CA1), cert. denied, 403 U. S. 939 (1971); *United States* v. *Pierce*, 397 F. 2d 128, 130–131 (CA4 1968); *Evans* v. *United States*, 375 F. 2d 355, 360–361 (CA8 1967), rev'd on other grounds *sub nom. Bruton* v. *United States*, 391 U. S. 123 (1968); *United States ex rel. Sanders* v. *Rowe*, 460 F. Supp. 1128, 1137–1138 (ND Ill. 1978); *United States* v. *Pellegrini*, 309 F. Supp. 250, 257 (SDNY 1970). Cf. *Killough* v. *United States*, 114 U. S. App. D. C. 305, 312, 315 F. 2d 241, 248 (1962) (Wright, J., concurring) (*McNabb-Mallory* violation) (*McNabb* v. *United States*, 318 U. S. 332 (1943); *Mallory* v. *United States*, 354 U. S. 449 (1957)).

[4] Three decisions from the Second and Ninth Circuits that are cited in the Court's opinion reached similar results. See *ante*, at 310, n. 2, citing *United States* v. *Bowler*, 561 F. 2d 1323 (CA9 1977); *United States* v. *Toral*, 536 F. 2d 893 (CA9 1976); and *United States* v. *Knight*, 395 F. 2d 971 (CA2 1968), cert. denied, 395 U. S. 930 (1969). Yet subsequent decisions of the Ninth Circuit have made clear that *Bowler* and *Toral* have not led to an abandonment of traditional derivative-evidence analysis in that jurisdiction. See, *e. g.*, *United States* v. *Lee*, *supra*, at 468–469 ("Here, the second confession, a virtual repetition of the first, was obtained less than 24 hours after the first confession was elicited without *Miranda* warnings. . . . [T]he [second] confession was correctly suppressed as the fruit of the poisonous tree"). And the Second Circuit has expressly reserved the question whether "the exclusion of a second confession might be required in order to deter avoidance of *Miranda* in obtaining the first." *Tanner* v. *Vincent*, 541 F. 2d 932, 937, n. 5 (1976), cert. denied, 429 U. S. 1065 (1977).

[5] See, *e. g.*, *State* v. *Montes*, 136 Ariz. 491, 496–497, 667 P. 2d 191, 196–197 (1983) (en banc); *State* v. *Holt*, 354 So. 2d 888, 890 (Fla. App.),

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cert. denied, 361 So. 2d 832 (Fla. 1978); *Fried* v. *State*, 42 Md. App. 643, 646–648, 402 A. 2d 101, 102–104 (1979).

[6] See, *e. g.*, *Cagle* v. *State*, 45 Ala. App. 3, 4, 221 So. 2d 119, 120 (subsequent confession suppressed), cert. denied, 284 Ala. 727, 221 So. 2d 121 (1969); *People* v. *Braeseke*, 25 Cal. 3d 691, 703–704, 602 P. 2d 384, 391–392 (1979) (same), vacated on other grounds, 446 U. S. 932 (1980); *In re Pablo A. C.*, 129 Cal. App. 3d 984, 989–991, 181 Cal. Rptr. 468, 471–472 (1982) (same); *People* v. *Saiz*, 620 P. 2d 15, 19–21 (Colo. 1980) (en banc) (same); *People* v. *Algien*, 180 Colo. 1, 8, 501 P. 2d 468, 471 (1972) (en banc) (same); *State* v. *Derrico*, 181 Conn. 151, 165–167, 434 A. 2d 356, 365–366 (taint dissipated), cert. denied, 449 U. S. 1064 (1980); *Smith* v. *State*, 132 Ga. App. 491, 492, 208 S. E. 2d 351 (1974) (subsequent confession suppressed); *State* v. *Medeiros*, 4 Haw. App. 248, 252–253, 665 P. 2d 181, 184–185 (1983) (taint dissipated); *People* v. *Jordan*, 90 Ill. App. 3d 489, 495, 413 N. E. 2d 195, 199 (1980) (subsequent confession suppressed); *People* v. *Raddatz*, 91 Ill. App. 2d 425, 429–436, 235 N. E. 2d 353, 355–359 (1968) (same); *State* v. *Gress*, 210 Kan. 850, 852–854, 504 P. 2d 256, 259–261 (1972) (taint dissipated); *State* v. *Lekas*, 201 Kan. 579, 585–588, 442 P. 2d 11, 17–19 (1968) (subsequent confession suppressed); *State* v. *Young*, 344 So. 2d 983, 987 (La. 1977) (taint dissipated); *State* v. *Welch*, 337 So. 2d 1114, 1120 (La. 1976) (subsequent confession suppressed); *State* v. *Ayers*, 433 A. 2d 356, 362 (Me. 1981) (trial statement suppressed); *State* v. *Sickels*, 275 N. W. 2d 809, 813–814 (Minn. 1979) (taint dissipated); *State* v. *Raymond*, 305 Minn. 160, 168–172, 232 N. W. 2d 879, 884–886 (1975) (same); *Brunson* v. *State*, 264 So. 2d 817, 819–820 (Miss. 1972) (subsequent confession suppressed); *State* v. *Wright*, 515 S. W. 2d 421, 426–427 (Mo. 1974) (en banc) (taint dissipated); *State* v. *Williams*, 486 S. W. 2d 468, 474 (Mo. 1972) (subsequent confession suppressed); *In re R. P. S.*, —— Mont. ——, ——, 623 P. 2d 964, 968–969 (1981) (taint dissipated); *Rhodes* v. *State*, 91 Nev. 17, 21–22, 530 P. 2d 1199, 1201–1202 (1975) (dictum); *People* v. *Bodner*, 75 App. Div. 2d 440, 447–449, 430 N. Y. S. 2d 433, 438–439 (1980) (subsequent confession suppressed); *State* v. *Edwards*, 284 N. C. 76, 78–81, 199 S. E. 2d 459, 461–462 (1973) (same); *State* v. *Hibdon*, 57 Ore. App. 509, 512, 645 P. 2d 580 (1982) (same); *Commonwealth* v. *Chacko*, 500 Pa. 571, 580–582, 459 A. 2d 311, 316 (1983) (taint dissipated); *Commonwealth* v. *Wideman*, 460 Pa. 699, 708–709, 334 A. 2d 594, 599 (1975) (subsequent confession suppressed); *State* v. *Branch*, 298 N. W. 2d 173, 175–176 (S. D. 1980) (taint dissipated);

The Court today sweeps aside this common-sense approach as "speculative" reasoning, adopting instead a rule that "the psychological impact of *voluntary* disclosure of a guilty secret" neither "qualifies as state compulsion" nor "compromises the voluntariness" of subsequent confessions. *Ante*, at 312, 313 (emphasis added). So long as a suspect receives the usual *Miranda* warnings before further interrogation, the Court reasons, the fact that he "is free to exercise his own volition in deciding whether or not to make" further confessions "ordinarily" is a sufficient "cure" and serves to break any causal connection between the illegal confession and subsequent statements. *Ante*, at 308, 311.

The Court's marble-palace psychoanalysis is tidy, but it flies in the face of our own precedents, demonstrates a startling unawareness of the realities of police interrogation, and is completely out of tune with the experience of state and federal courts over the last 20 years. Perhaps the Court has grasped some psychological truth that has eluded persons far more experienced in these matters; if so, the Court owes an explanation of how so many could have been so wrong for so many years.

A

(1)

This Court has had long experience with the problem of confessions obtained after an earlier confession has been

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Martin v. *State*, 1 Tenn. Crim. App. 282, 289–291, 440 S. W. 2d 624, 627–628 (1968) (subsequent confession suppressed); *State* v. *Badger*, 141 Vt. 430, 439–441, 450 A. 2d 336, 342–343 (1982) (same); *State* v. *Lavaris*, 99 Wash. 2d 851, 856–860, 664 P. 2d 1234, 1237–1239 (1983) (en banc) (same).

The Court scrambles to distinguish some of the cases cited in this footnote and in notes 3 and 4, *supra*, arguing that "JUSTICE BRENNAN cannot seriously mean to equate" these precedents with the case at hand. *Ante*, at 313, n. 3. To the contrary. Although many of these cases unquestionably raised traditional due process questions on their individual facts, that is not the ground on which they were decided. Instead, courts in every one of the cited cases explicitly or implicitly recognized the applicability of traditional derivative-evidence analysis in evaluating the consequences of *Miranda* violations.

illegally secured. Subsequent confessions in these circumstances are not *per se* inadmissible, but the prosecution must demonstrate facts "sufficient to insulate the [subsequent] statement from the effect of all that went before." *Clewis* v. *Texas*, 386 U. S. 707, 710 (1967). If the accused's subsequent confession was merely the culmination of "one continuous process," or if the first confession was merely "filled in and perfected by additional statements given in rapid succession," the subsequent confession is inadmissible even though it was not obtained through the same illegal means as the first. *Leyra* v. *Denno*, 347 U. S. 556, 561 (1954); see also *Westover* v. *United States*, decided together with *Miranda* v. *Arizona*, 384 U. S. 436, 494–496 (1966). The question in each case is whether the accused's will was "overborne at the time he confessed," and the prosecution must demonstrate that the second confession "was an act independent of the [earlier] confession." *Reck* v. *Pate*, 367 U. S. 433, 440, 444 (1961).

One of the factors that can vitiate the voluntariness of a subsequent confession is the hopeless feeling of an accused that he has nothing to lose by repeating his confession, even where the circumstances that rendered his first confession illegal have been removed. As the Court observed in *United States* v. *Bayer*, 331 U. S., at 540:

> "[A]fter an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession always may be looked upon as a fruit of the first."

The Court today decries the "irremediable consequences" of this reasoning, *ante*, at 309, but it has always been clear that even after "let[ting] the cat out of the bag" the accused is not "perpetually disable[d]" from giving an admissible subsequent confession. *United States* v. *Bayer*, *supra*, at 541.

Rather, we have held that subsequent confessions in such circumstances may be admitted if the prosecution demonstrates that, "[c]onsidering the 'totality of the circumstances,'" there was a "'break in the stream of events . . . sufficient to insulate'" the subsequent confession from the damning impact of the first. *Darwin* v. *Connecticut,* 391 U. S. 346, 349 (1968) (citations omitted). Although we have thus rejected a *per se* rule forbidding the introduction of subsequent statements in these circumstances, we have emphasized that the psychological impact of admissions and confessions of criminal guilt nevertheless can have a decisive impact in undermining the voluntariness of a suspect's responses to continued police interrogation and must be accounted for in determining their admissibility. As Justice Harlan explained in his separate *Darwin* opinion:

> "A principal reason why a suspect might make a second or third confession is simply that, having already confessed once or twice, he might think he has little to lose by repetition. If a first confession is not shown to be voluntary, I do not think a later confession that is merely a direct product of the earlier one should be held to be voluntary. It would be neither conducive to good police work, nor fair to a suspect, to allow the erroneous impression that he has nothing to lose to play the major role in a defendant's decision to speak a second or third time.
>
> "In consequence, when the prosecution seeks to use a confession uttered after an earlier one not found to be voluntary, it has . . . the burden of proving not only that the later confession was not itself the product of improper threats or promises or coercive conditions, but also that it was not directly produced by the existence of the earlier confession." *Id.,* at 350–351 (concurring in part and dissenting in part).

See also *Brown* v. *Illinois,* 422 U. S. 590, 605, n. 12 (1975) ("The fact that Brown had made one statement, believed by him to be admissible, . . . bolstered the pressures for him to give the second, or at least vitiated any incentive on his part to avoid self-incrimination"); *Beecher* v. *Alabama*, 389 U. S. 35, 36, n. 2 (1967) *(per curiam)* (existence of earlier illegal confession "is of course vitally relevant to the voluntariness of petitioner's later statements").[7]

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[7] The application of the "cat out of the bag" presumption is further illustrated by our decision in *Harrison* v. *United States*, 392 U. S. 219 (1968). Harrison took the stand at his trial in an attempt to rebut illegally obtained confessions that the prosecution had been permitted to introduce into evidence. His conviction was overturned on appeal because of the introduction of these confessions. On retrial, Harrison's earlier trial testimony was introduced and led to his second conviction. We reversed that conviction, reasoning that if Harrison testified "in order to overcome the impact of confessions illegally obtained and hence improperly introduced, then his testimony was tainted by the same illegality that rendered the confessions themselves inadmissible." *Id.*, at 223. We observed:

"It is, of course, difficult to unravel the many considerations that might have led the petitioner to take the witness stand at his former trial. But, having illegally placed his confessions before the jury, the Government can hardly demand a demonstration by the petitioner that he would not have testified as he did if his inadmissible confessions had not been used. 'The springs of conduct are subtle and varied,' Mr. Justice Cardozo once observed. 'One who meddles with them must not insist upon too nice a measure of proof that the spring which he released was effective to the exclusion of all others.' Having 'released the spring' by using the petitioner's unlawfully obtained confessions against him, the Government must show that its illegal action did not induce his testimony." *Id.*, at 224–225 (footnotes omitted).

The Court today cryptically acknowledges the *Harrison* precedent, *ante*, at 316–317, but it wholly fails to explain the palpable inconsistencies between its reasoning and the logical force of *Harrison*. Courts considering the applicability of *Harrison* to cases similar to the one before us have correctly recognized that it sheds controlling light on whether to presume a causal connection between illegal confessions and an individual's decision to speak again. See, *e. g.*, *Randall* v. *Estelle*, 492 F. 2d, at 120–121; *Fisher* v. *Scafati*, 439 F. 2d, at 311; *People* v. *Saiz*, 620 P. 2d, at 19; *Commonwealth* v. *Wideman*, 460 Pa., at 709, 334 A. 2d, at 599; *State* v. *Lavaris*, 99 Wash. 2d, at 859, 664 P. 2d, at 1238. See also *State* v. *Ayers*, 433 A. 2d, at 362 (citing cases).

(2)

Our precedents did not develop in a vacuum. They reflect an understanding of the realities of police interrogation and the everyday experience of lower courts. Expert interrogators, far from dismissing a first admission or confession as creating merely a "speculative and attenuated" disadvantage for a suspect, *ante*, at 313, understand that such revelations frequently lead directly to a full confession. Standard interrogation manuals advise that "[t]he securing of the first admission is the biggest stumbling block . . . ." A. Aubry & R. Caputo, Criminal Interrogation 290 (3d ed. 1980). If this first admission can be obtained, "there is every reason to expect that the first admission will lead to others, and eventually to the full confession." *Ibid.*

> "For some psychological reason which does not have to concern us at this point 'the dam finally breaks as a result of the first leak' with regards to the tough subject. . . . Any structure is only as strong as its weakest component, and total collapse can be anticipated when the weakest part first begins to sag." *Id.*, at 291.

Interrogators describe the point of the first admission as the "breakthrough" and the "beachhead," R. Royal & S. Schutt, The Gentle Art of Interviewing and Interrogation: A Professional Manual and Guide 143 (1976), which once obtained will give them enormous "tactical advantages," F. Inbau & J. Reid, Criminal Interrogation and Confessions 82 (2d ed. 1967). See also W. Dienstein, Technics for the Crime Investigator 117 (2d ed. 1974). Thus "[t]he securing of incriminating admissions might well be considered as the beginning of the final stages in crumbling the defenses of the suspect," and the process of obtaining such admissions is described as "the spadework required to motivate the subject into making the full confession." Aubry & Caputo, *supra*, at 31, 203.

"Once the initial admission has been made, further inducement in the form of skillfully applied interrogation techniques will motivate the suspect into making the confession." *Id.*, at 26; see also *id.*, at 33 (initial admissions are "capitalized upon by the interrogator in securing the eventual confession"). Some of these "skillfully applied" techniques involve direct confrontation of the suspect with the earlier admission, but many of the techniques are more discreet and create leverage without the need of expressly discussing the earlier admission. These techniques are all aimed at reinforcing in the suspect's mind that, as one manual describes it, "'you're wasting your own time, and you're wasting my time, you're guilty and you know it, I know it, what's more, you know that I know it.'" *Id.*, at 234.[8]

The practical experience of state and federal courts confirms the experts' understanding. From this experience, lower courts have concluded that a first confession obtained without proper *Miranda* warnings, far from creating merely some "speculative and attenuated" disadvantage for the accused, *ante*, at 313, frequently enables the authorities to obtain subsequent confessions on a "silver platter." *Cagle* v. *State*, 45 Ala. App. 3, 4, 221 So. 2d 119, 120, cert. denied, 284 Ala. 727, 221 So. 2d 121 (1969).

One police practice that courts have frequently encountered involves the withholding of *Miranda* warnings until the end of an interrogation session. Specifically, the police escort a suspect into a room, sit him down and, without explaining his Fifth Amendment rights or obtaining a knowing and voluntary waiver of those rights, interrogate him about his suspected criminal activity. If the police obtain a confession, it is then typed up, the police hand the suspect a pen for his signature, and—just before he signs—the police advise him of his *Miranda* rights and ask him to proceed. Alternatively, the police may call a stenographer in after they have obtained the confession, advise the suspect for the first time of his *Miranda* rights, and ask him to repeat what he has just told them. In such circumstances, the process of giving *Miranda* warnings and obtaining the final confession is "'merely a formalizing, a setting down almost as a scrivener does, [of] what ha[s] already taken [place].'" *People* v. *Raddatz*, 91 Ill. App. 2d 425, 430, 235 N. E. 2d 353, 356 (1968) (quoting trial court). In such situations, where "it was all over except for reading aloud and explaining the written waiver of the *Miranda* safeguards," courts have time and again concluded that "[t]he giving of the *Miranda* warnings before reducing the product of the day's work to written form could not undo what had been done or make legal what was illegal." *People* v. *Bodner*, 75 App. Div. 2d 440, 448, 430 N. Y. S. 2d 433, 438 (1980).[9]

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[8] See also A. Aubry & R. Caputo, Criminal Interrogation 206 (3d ed. 1980) (discussing the "fait accompli," or "what's done is done, and you can't change it now" approach), *id.*, at 239 (discussing the "I would sure hate to be in your shoes" and the "[t]hings sure look dark for you" techniques); F. Inbau & J. Reid, Criminal Interrogation and Confessions 26–31 (2d ed. 1967) (displaying an air of confidence in the subject's guilt), *id.*, at 77 (creating the impression of the futility of resistance); R. Royal & S. Schutt, The Gentle Art of Interviewing and Interrogation: A Professional Manual and Guide 145–149 (1976) (techniques for "capitaliz[ing]" on the "breakthrough" admission).

There are numerous variations on this theme. Police may obtain a confession in violation of *Miranda* and then take a break for lunch or go home for the evening. When questioning is resumed, this time preceded by *Miranda* warnings, the suspect is asked to "clarify" the earlier illegal confession and to provide additional information.[10] Or he is led by one of the interrogators into another room, introduced to another official, and asked to repeat his story. The new officer then gives the *Miranda* warnings and asks the suspect to proceed.[11] Alternatively, the suspect might be questioned by arresting officers "in the field" and without *Miranda* warnings, as was young Elstad in the instant case. After making incriminating admissions or a confession, the suspect is then brought into the station house and either questioned by the same officers again or asked to repeat his earlier statements to another officer.[12]

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[9] See also *United States* v. *Nash*, 563 F. 2d, at 1168; *People* v. *Saiz*, 620 P. 2d, at 20; *State* v. *Lekas*, 201 Kan., at 581–582, 442 P. 2d, at 14–15; *Commonwealth* v. *Wideman*, 460 Pa., at 704, 334 A. 2d, at 597; *State* v. *Badger*, 141 Vt., at 434–437, 450 A. 2d, at 339–340; *State* v. *Lavaris*, 99 Wash. 2d, at 854–856, 664 P. 2d, at 1236–1237.

[10] See, *e. g.*, *United States* v. *Lee*, 699 F. 2d, at 467–469; *Smith* v. *State*, 132 Ga. App., at 491–492, 208 S. E. 2d, at 351; *State* v. *Welch*, 337 So. 2d, at 1120; *Martin* v. *State*, 1 Tenn. Crim. App., at 289–290, 440 S. W. 2d, at 627; *State* v. *Badger*, *supra*, at 440, 450 A. 2d, at 342.

The variations of this practice are numerous, but the underlying problem is always the same: after hearing the witness testimony and considering the practical realities, courts have confirmed the time-honored wisdom of presuming that a first illegal confession "taints" subsequent confessions, and permitting such subsequent confessions to be admitted at trial *only* if the prosecution convincingly rebuts the presumption. They have discovered that frequently, "[h]aving once confessed [the accused] was ready to confess some more." *State* v. *Lekas*, 201 Kan. 579, 587–588, 442 P. 2d 11, 19 (1968). For all practical purposes, the prewarning and postwarning questioning are often but stages of one overall interrogation. Whether or not the authorities explicitly confront the suspect with his earlier illegal admissions makes no significant difference, of course, because the suspect knows that the authorities know of his earlier statements and most frequently will believe that those statements already have sealed his fate. Thus a suspect in such circumstances is likely to conclude that "he might as well answer the questions put to him, since the [authorities are] already aware of the earlier answers," *United States* v. *Pierce*, 397 F. 2d 128, 131 (CA4 1968); he will probably tell himself that "it's O. K., I have already told them," *State* v. *Lekas, supra*, at 582, 442 P. 2d, at 15. See also *Cagle* v. *State*, 45 Ala. App., at 4, 221 So. 2d, at 120 ("I have already give[n] the Chief . . . a statement, and I might as well give one to you, too"). In such circumstances, courts have found, a suspect almost invariably asks himself, "What use is a lawyer? What good is a lawyer now? What benefit can a lawyer tell me? *[sic]* I have already told the police everything." *People* v. *Raddatz*, 91 Ill. App. 2d, at 430, 235 N. E. 2d, at 356.[13]

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[11] See, *e. g.*, *United States* v. *Pierce*, 397 F. 2d, at 129–130; *Evans* v. *United States*, 375 F. 2d, at 358; *Cagle* v. *State*, 45 Ala. App., at 4, 221 So. 2d, at 120; *People* v. *Braeseke*, 25 Cal. 3d, at 695–696, 602 P. 2d, at 386–388; *People* v. *Algien*, 180 Colo., at 4–5, 501 P. 2d, at 469–470; *People* v. *Raddatz*, 91 Ill. App. 2d, at 428–429, 235 N. E. 2d, at 355; *Rhodes* v. *State*, 91 Nev., at 21, 530 P. 2d, at 1201.

[12] See, *e. g.*, *Randall* v. *Estelle*, 492 F. 2d, at 119–120; *In re Pablo A. C.*, 129 Cal. App. 3d, at 987–988, 181 Cal. Rptr., at 470; Note, 45 Denver L. J. 427, 462–463 (1968).

I would have thought that the Court, instead of dismissing the "cat out of the bag" presumption out of hand, would have accounted for these practical realities. Compare *Nardone* v. *United States*, 308 U. S., at 342 (derivative-evidence rules should be grounded on the "learning, good sense, fairness and courage" of lower-court judges). Expert interrogators and experienced lower-court judges will be startled, to say the least, to learn that the connection between multiple confessions is "speculative" and that a subsequent rendition of *Miranda* warnings "ordinarily" enables the accused in these circumstances to exercise his "free will" and to make "a rational and intelligent choice whether to waive or invoke his rights." *Ante*, at 311, 314.

(3)

The Court's new view about the "psychological impact" of prior illegalities also is at odds with our Fourth Amendment precedents. For example, it is well established that a confession secured as a proximate result of an illegal arrest must be suppressed. See, *e. g.*, *Taylor* v. *Alabama*, 457 U. S. 687 (1982); *Brown* v. *Illinois*, 422 U. S. 590 (1975); *Wong Sun* v. *United States*, 371 U. S. 471 (1963). We have emphasized in this context that "verbal evidence which derives so immediately from an unlawful entry and an unauthorized arrest . . . is no less the 'fruit' of official illegality than the more common tangible fruits of the unwarranted intrusion." *Wong Sun* v. *United States*, *supra*, at 485.

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[13] See also *Killough* v. *United States*, 114 U. S. App. D. C., at 313–314, 315 F. 2d, at 249–250 (Wright, J., concurring) (*McNabb-Mallory* violation) ("[H]uman nature being what it is, we must recognize a presumption that one [confession] is the fruit of the other. . . . While the psychological helplessness that comes from surrender need not last forever, . . . the burden should be on the Government to show that a second confession did not spring from a mind in which all the mechanisms of resistance are still subdued by defeat and the apparent futility of further combat").

The Court seeks to distinguish these precedents on the ground that Fourth Amendment violations require a broader exclusionary rule than do Fifth Amendment violations. *Ante*, at 306. I address this reasoning in Part II–B, *infra*. But the question immediately at issue—whether there should be a presumptive rule against finding a causal connection between successive confessions—would surely seem to be controlled by the logic of these Fourth Amendment cases. In part because of the inherent psychological pressures attendant upon an arrest, we have refused to presume that a confession following an illegal arrest is "sufficiently an act of free will to purge the primary taint of the unlawful invasion." *Wong Sun* v. *United States*, *supra*, at 486. See also *Brown* v. *Illinois*, *supra*, at 601–603. If the Court so quickly dismisses the notion of a multiple-confession taint as nothing more than a "speculative and attenuated" disadvantage, *ante*, at 313, what is to prevent it in the future from deciding that, contrary to the settled understanding, the fact of a proximate illegal arrest is presumptively nothing but a "speculative and attenuated" disadvantage to a defendant who is asked to confess?

Similarly, a confession obtained as a proximate result of confronting the accused with illegally seized evidence is inadmissible as the fruit of the illegal seizure. See, *e. g.*, *Fahy* v. *Connecticut*, 375 U. S. 85, 90–91 (1963) (remanding for determination whether admission was so induced); see generally 3 W. LaFave, Search and Seizure § 11.4, pp. 638–642

(1978) (collecting cases). As commentators have noted, courts in finding such confessions to be tainted by the Fourth Amendment violation have emphasized that "'the realization that the "cat is out of the bag" plays a significant role in encouraging the suspect to speak.'" *Id.*, § 11.4, p. 639 (footnote omitted). By discarding the accepted "cat out of the bag" presumption in the successive-confession context, however, the Court now appears to have opened the door to applying this same simplistic reasoning to Fourth Amendment violations.[14]

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[14] The Court cites three cases in support of its assertion that an illegally obtained "guilty secret" does not "ordinarily" compromise the voluntariness of a subsequent confession preceded by the usual *Miranda* warnings. *Ante*, at 316–317. These cases are all inapposite. The Court in *McMann* v. *Richardson*, 397 U. S. 759 (1970), held that a defendant's guilty plea may not be attacked on federal collateral review on the ground that it was induced by the mistaken assumption that an illegal confession might have been admitted at trial and have led to conviction. *Id.*, at 770. The Court emphasized that this bar applies only when the defendant pleads in "open court" and the decision not to challenge the confession is based on "the good-faith evaluations of a reasonably competent attorney." *Id.*, at 770, 773. Thus the defendant's decision to reiterate the confession is insulated in these circumstances by the assistance of counsel *and* review by a court—factors wholly absent in the confession context at hand. The Court in *McMann* noted that collateral review *is* available where the defendant "was incompetently advised by his attorney," *id*, at 772, and in light of this qualification I cannot see how that case is at all analogous to *uncounseled* decisions to repeat a proximate confession.

Similarly, in *Frazier* v. *Cupp*, 394 U. S. 731 (1969), the Court held that police misrepresentations concerning an accomplice, while "relevant" to the admissibility of the defendant's confession, did not vitiate the voluntariness of the confession under the totality of the circumstances of that case. *Id.*, at 739. The defendant there, however, had received warnings which were proper at the time. *Ibid.* And under the Fifth Amendment, there of course are significant distinctions between the use of third-party statements in obtaining a confession and the use of the accused's own previously compelled illegal admissions.

Finally, the respondent in *California* v. *Beheler*, 463 U. S. 1121 (1983) *(per curiam)*, was not in custody at all when he spoke with the police, and

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The correct approach, administered for almost 20 years by most courts with no untoward results, is to presume that an admission or confession obtained in violation of *Miranda* taints a subsequent confession unless the prosecution can show that the taint is so attenuated as to justify admission of the subsequent confession. See cases cited in nn. 3, 6, *supra.* Although the Court warns against the "irremediable consequences" of this presumption, *ante*, at 309, it is obvious that a subsequent confession, just like any other evidence that follows upon illegal police action, does not become "sacred and inaccessible." *Silverthorne Lumber Co.* v. *United States*, 251 U. S., at 392. As with any other evidence, the inquiry is whether the subsequent confession "'has been come at by exploitation of [the] illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" *Wong Sun* v. *United States*, 371 U. S., at 488 (citation omitted).

Until today the Court has recognized that the dissipation inquiry requires the prosecution to demonstrate that the official illegality did not taint the challenged confession, and we have rejected the simplistic view that abstract notions of "free will" are alone sufficient to dissipate the challenged taint.

> "The question whether a confession is the product of a free will under *Wong Sun* must be answered on the facts of each case. No single fact is dispositive. The work-

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the Court rejected his contention that "his lack of awareness [of the consequences of what he said] transformed the situation into a custodial one." *Id.*, at 1125, n. 3. The Court emphasized that a person is in "custody" for purposes of the Fifth Amendment only if "there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *Id.*, at 1125 (citation omitted). Michael Elstad obviously was in custody at the time he was questioned. See Part II–D, *infra.*

> ings of the human mind are too complex, and the possibilities of misconduct too diverse, to permit protection of [constitutional rights] to turn on . . . a talismanic test." *Brown* v. *Illinois*, 422 U. S., at 603.

Instead, we have instructed courts to consider carefully such factors as the strength of the causal connection between the illegal action and the challenged evidence, their proximity in time and place, the presence of intervening factors, and the "purpose and flagrancy of the official misconduct." *Id.*, at 603–604.

The Court today shatters this sensitive inquiry and decides instead that, since individuals possess "'will, perception, memory and volition,'" a suspect's "exercise [of] his own volition in deciding whether or not to make a [subsequent] statement to the authorities" must "ordinarily" be viewed as sufficient to dissipate the coercive influence of a prior confession obtained in violation of *Miranda*. *Ante*, at 308, 309, 311 (citation omitted). But "[w]ill, perception, memory and volition are only relevant as they provide meaningful alternatives in the causal chain, not as mystical qualities which in themselves invoke the doctrine of attenuation." Hirtle, Inadmissible Confessions and Their Fruits: A Comment on Harrison v. United States, 60 J. Crim. L., C., & P. S. 58, 62 (1969). Thus we have *always* rejected, until today, the notion that "individual will" alone presumptively serves to insulate a person's actions from the taint of earlier official illegality. See, *e. g.*, *United States* v. *Ceccolini*, 435 U. S. 268, 274–275 (1978) (rejecting Government's request for a rule "that the testimony of a live witness should not be excluded at trial no matter how close and proximate the connection between it" and an illegal search); *Wong Sun* v. *United States*, *supra*, at 486 (confession obtained as a proximate result of an illegal arrest is not presumptively admissible as an "intervening independent act of a free will").

Nor have we ever allowed *Miranda* warnings alone to serve talismanically to purge the taint of prior illegalities. In *Brown* v. *Illinois*, for example, we emphasized that

"*Miranda* warnings, *alone* and *per se*, cannot always make [a confession] sufficiently a product of free will to break . . . the causal connection between [an illegal arrest] and the confession." 422 U. S., at 603 (emphasis in original).[15] See also *Taylor* v. *Alabama*, 457 U. S., at 690–691. The reason we rejected this rule is manifest: "The *Miranda* warnings in no way inform a person of his Fourth Amendment rights, including his right to be released from unlawful custody following an arrest made without a warrant or without probable cause." *Brown* v. *Illinois*, *supra*, at 601, n. 6.

This logic applies with even greater force to the Fifth Amendment problem of successive confessions. Where an accused believes that it is futile to resist because the authorities already have elicited an admission of guilt, the mere rendition of *Miranda* warnings does not convey the information most critical at that point to ensuring his informed and voluntary decision to speak again: that the earlier confession may not be admissible and thus that he need not speak out of any feeling that he already has sealed his fate. The Court therefore is flatly wrong in arguing, as it does repeatedly, that the mere provision of *Miranda* warnings prior to subsequent interrogation supplies the accused with "the relevant information" and ensures that a subsequent confession "ordinarily" will be the product of "a rational and intelligent choice" and "'an act of free will.'" *Ante*, at 311, 314.[16]

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[15] Under a contrary rule, we emphasized, "[a]ny incentive to avoid Fourth Amendment violations would be eviscerated by making the warnings, in effect, a 'cure-all,' and the constitutional guarantee against unlawful searches and seizures could be said to be reduced to 'a form of words.'" 422 U. S., at 602–603.

[16] See, *e. g.*, *Fisher* v. *Scafati*, 439 F. 2d, at 311 ("All that intervened between the two confessions was a full *Miranda* warning, which of course did not warn the defendant that the first confession was invalid and could not be used against him"); *People* v. *Saiz*, 620 P. 2d, at 20; *People* v. *Raddatz*, 91 Ill. App. 2d, at 434, 235 N. E. 2d, at 357–358 ("If a suspect is to intelligently waive his Fifth Amendment rights he is entitled to know the scope of the amendment's protection at the time he is being interrogated. In the absence of this knowledge of the consequence of his prior

The Court's new approach is therefore completely at odds with established dissipation analysis. A comparison of the Court's analysis with the factors most frequently relied on by lower courts in considering the admissibility of subsequent confessions demonstrates the practical and legal flaws of the new rule.

Advice that earlier confession may be inadmissible. The most effective means to ensure the voluntariness of an accused's subsequent confession is to advise the accused that his earlier admissions may not be admissible and therefore that he need not speak solely out of a belief that "the cat is out of the bag." Many courts have required such warnings in the absence of other dissipating factors,[17] and this Court has not uncovered anything to suggest that this approach has not succeeded in the real world. The Court, however, believes that law enforcement authorities could never possibly understand "the murky and difficult questio[n]" of when

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confession, Raddatz' waiver of rights cannot be considered one intelligently made"); *State* v. *Lavaris*, 99 Wash. 2d, at 860, 664 P. 2d, at 1239. See also Pitler, "The Fruit of the Poisonous Tree" Revisited and Shepardized, 56 Calif. L. Rev. 579, 608–609 (1968). Cf. *Killough* v. *United States*, 114 U. S. App. D. C., at 313, 315 F. 2d, at 249 (Wright, J., concurring) ("The assumption that a commissioner's statement to an accused, who has already confessed, that he may remain silent, will immediately remove the psychological disadvantage he suffers when confronting the same officers, who know his secret, is simply unrealistic").

[17] "It has also been held, generally, that the influence of the improper inducement is removed when the accused is properly cautioned before the subsequent confession. The warning so given, however, should be explicit, and it ought to be full enough to apprise the accused (1) that anything he may say after such warning can be used against him; and (2) that his previous confession, made under improper inducement, cannot be used against him." 2 F. Wharton, Criminal Evidence § 359, p. 66 (12th ed. 1955) (citing cases). See also *Williams* v. *United States*, 328 F. 2d 669, 672–673 (CA5 1964); *State* v. *Edwards*, 284 N. C., at 80–81, 199 S. E. 2d, at 462; *State* v. *Williams*, 162 W. Va. 309, 318, 249 S. E. 2d 758, 764 (1978); 1 W. LaFave & J. Israel, Criminal Procedure § 9.4, p. 747, § 9.5, p. 767 (1984); E. Cleary, McCormick on Evidence § 157, pp. 345–346 (2d ed. 1972).

Miranda warnings must be given, and therefore that they are "ill-equipped" to make the decision whether supplementary warnings might be required. *Ante*, at 316.

This reasoning is unpersuasive for two reasons. First, the whole point of *Miranda* and its progeny has been to prescribe "bright line" rules for the authorities to follow.[18] Although borderline cases will of course occasionally arise, thus militating against a *per se* rule requiring supplementary warnings, the experience of the lower courts demonstrates that the vast majority of confrontations implicating this question involve obvious *Miranda* violations. The occasional "murky and difficult" case should not preclude consideration of supplementary warnings in situations where the authorities could not possibly have acted in an objectively reasonable manner in their earlier interrogation of the accused. Second, even where the authorities are not certain that an earlier confession has been illegally obtained, courts and commentators have recognized that a supplementary warning merely advising the accused that his earlier confession *may* be inadmissible can dispel his belief that he has nothing to lose by repetition.[19]

Proximity in time and place. Courts have frequently concluded that a subsequent confession was so removed in time and place from the first that the accused most likely was able fully to exercise his independent judgment in deciding whether to speak again.[20] As in the instant case, however, a second confession frequently follows immediately on the heels of the first and is obtained by the same officials in the same or similar coercive surroundings. In such situations, it is wholly unreasonable to assume that the mere rendition of *Miranda* warnings will safeguard the accused's freedom of action.

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[18] See n. 41, *infra*.

[19] In addition to the sources cited in n. 17, *supra*, see Note, 45 Denver L. J., *supra* n. 12, at 463, suggesting the following warning: "Nothing that you may have said or confessed to prior to this time to any law enforcement official may be used against you in any way unless they first told you of your right to remain silent and to talk to an attorney and have him present during questioning, and you then agreed to talk to them. Do you understand?"

[20] See, *e. g.*, *State* v. *Raymond*, 305 Minn., at 171–172, 232 N. W. 2d, at 886.

The Court today asserts, however, that the traditional requirement that there be a "break in the stream of events" is "inapposite" in this context. *Ante*, at 310. Yet most lower courts that have considered the question have recognized that our decision in *Westover* v. *United States*, 384 U. S., at 494, compels the contrary conclusion.[21] There the accused was questioned by local authorities for several hours and then turned over to federal officials, who only then advised him of his constitutional rights and obtained a confession. We concluded that Westover's waiver was invalid because, from Westover's perspective, the separate questioning amounted to but one continuous period of interrogation, "the warnings came at the end of the interrogation process," and the giving of warnings could not dissipate the effect of the earlier, illegal questioning. *Id.*, at 496.[22] Thus it is clear that *Miranda* warnings given at the end of the interrogation process cannot dispel the illegality of what has gone before. If this is so in a situation like *Westover*, where the accused had not yet given a confession, how can the Court possibly conclude otherwise where the accused already has confessed and therefore feels that he has nothing to lose by "confess[ing] some more?" *State* v. *Lekas*, 201 Kan., at 588, 442 P. 2d, at 19.

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[21] See, *e. g.*, *State* v. *Medeiros*, 4 Haw. App., at 252–253, 665 P. 2d, at 184–185; *People* v. *Raddatz*, 91 Ill. App. 2d, at 431–433, 235 N. E. 2d, at 356–357; *State* v. *Lekas*, 201 Kan., at 585, 442 P. 2d, at 17; *People* v. *Bodner*, 75 App. Div. 2d, at 447–448, 430 N. Y. S. 2d, at 438; *State* v. *Badger*, 141 Vt., at 439–440, 450 A. 2d, at 342; *State* v. *Lavaris*, *supra*, at 857–858, 664 P. 2d, at 1237–1238. See also *People* v. *Saiz*, 620 P. 2d, at 20; *Rhodes* v. *State*, 91 Nev., at 21, 530 P. 2d, at 1201. See generally George, The Fruits of Miranda: Scope of the Exclusionary Rule, 39 U. Colo. L. Rev. 478, 492–494 (1967); Pitler, 56 Calif. L. Rev., *supra* n. 16, at 612–613, 618; Comment, 41 Brooklyn L. Rev. 325, 330 (1974); Note, 45 Denver L. J., *supra* n. 12, at 461–463.

After reviewing the cases cited in nn. 3–6, *supra*, the Court pronounces that "the majority have explicitly or implicitly recognized that *Westover*'s requirement of a break in the stream of events is inapposite." *Ante*, at 310, and n. 1. This is incorrect. Whether "explicitly" or "implicitly," the majority of the cited cases have "recognized" precisely the contrary.

Intervening factors. Some lower courts have found that because of intervening factors—such as consultation with a lawyer or family members, or an independent decision to speak—an accused's subsequent confession could not fairly be attributed to the earlier statement taken in violation of *Miranda*.[23] On the other hand, where as here an accused has continuously been in custody and there is no legitimate suggestion of an intervening event sufficient to break the impact of the first confession, subsequent confessions are inadmissible.[24] The Court reasons, however, that because "[a] suspect's confession *may* be traced to . . . an intervening event," it "*must* [be] conclude[d]" that subsequent *Miranda* warnings presumptively enable the suspect to make "a rational and intelligent choice" whether to repeat his confession. *Ante*, at 314 (emphasis added). In applying the intervening-events inquiry, however, "courts must use a surgeon's scalpel and not a meat axe." Cf. 3 W. LaFave, Search and Seizure § 11.4, p. 624 (1978). The only proper inquiry is whether a meaningful intervening event *actually* occurred, not whether a court simply chooses to shut its eyes to human nature and the realities of custodial interrogation.

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[22] We advised: "A different case would be presented if an accused were taken into custody by the second authority, removed both in time and place from his original surroundings, and then adequately advised of his rights and given an opportunity to exercise them." 384 U. S., at 496.

[23] See, *e. g.*, *State* v. *Medeiros*, *supra*, at 252–253, 665 P. 2d, at 184–185; *In re R. P. S.*, —— Mont., at ——, 623 P. 2d, at 969.

[24] See cases in nn. 16, 22, *supra*.

Purpose and flagrancy of the illegality. Courts have frequently taken the "purpose and flagrancy of the official misconduct" into account in considering whether the taint of illegal action was sufficiently dissipated to render a confession admissible. *Brown* v. *Illinois*, 422 U. S., at 604. In part, this inquiry has reflected conviction that particularly egregious misconduct must be deterred through particularly stern action. This factor is also important, however, because it is fair to presume that if the authorities acted flagrantly in violating the law they probably did so for ulterior motives. Thus if the authorities blatantly failed to advise an accused of his constitutional rights while interrogating him and gave him the *Miranda* warnings only as they handed him a typed confession for his signature, it is fair to presume that they pursued their strategy precisely to weaken his ability knowingly and voluntarily to exercise his constitutional rights.

C

Perhaps because the Court is discomfited by the radical implications of its failure to apply the settled derivative-evidence presumption to violations of *Miranda*, it grudgingly qualifies its sweeping pronouncements with the acknowledgment that its new presumption about so-called "ordinary" *Miranda* violations can be overcome by the accused. *Ante*, at 311, 314. Explicitly eschewing "a *per se* rule," *ante*, at 317, the Court suggests that its approach should not be followed where the police have employed "improper tactics" or "inherently coercive methods" that are "calculated to undermine the suspect's ability to exercise his free will." *Ante*, at 308, 309, 312, n. 3; see also *ante*, at 312, 314, 317. The Court thus concedes that lower courts must continue to be free to "examine the surrounding circumstances and the entire course of police conduct with respect to the suspect in evaluating the voluntariness of his statements." *Ante*, at 318.

The Court's concessions are potentially significant, but its analysis is wholly at odds with established dissipation analysis. To begin with, the Court repeatedly suggests that a confession may be suppressed only if the police have used "improper tactics," *ante*, at 308; this obscure reasoning overlooks the fact that a violation of *Miranda* is obviously *itself* an "improper tactic," one frequently used precisely to undermine the voluntariness of subsequent confessions. See *supra*, at 329–332. The Court's negative implication that *Miranda* violations are *not* "improper tactics" is, to say the least, disquieting. Second, the Court reasons that the fact that the accused gave a subsequent confession is *itself* "highly probative" evidence that he was able to exercise his free will. *Ante*, at 318. This inaccurate premise follows from the Court's erroneous rejection of the "cat out of the bag" presumption in these circumstances and its inexplicable assertion that the previous extraction of a "guilty secret" neither constitutes compulsion nor compromises the voluntariness of later confessions. *Ante*, at 312.[25] Finally, the foundation of the derivative-evidence doctrine has always been that, where the authorities have acted illegally, *they* must bear the "ultimate burden" of proving that their misconduct did not "taint" subsequently obtained evidence. *Alderman* v. *United States*, 394 U. S. 165, 183 (1969); see also *Nardone* v. *United States*, 308 U. S., at 341. That is precisely the point of the derivative-evidence presumption. By rejecting this presumption in *Miranda* cases, the Court today appears to adopt a "go ahead and try to prove it" posture toward citizens whose Fifth Amendment *Miranda* rights have been violated, an attitude that marks a sharp break from the Court's traditional approach to official lawlessness.

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[25] The Court appears to limit the reach of its "guilty secret" doctrine to so-called "voluntary" confessions, but the logic of its analysis raises disturbing implications for the application of derivative-evidence rules to involuntarily obtained confessions. If a confession were extracted through savage beatings or other unconscionable techniques, and the accused were then permitted a good night's sleep and were questioned the next day by sympathetic officers, most would agree that the subsequent confession, if given out of the defeated feeling that the accused had nothing more to lose, should not be admissible because it just as surely was the product of torture as the earlier confession. Yet the Court permitted the admission of just such a confession in *Lyons* v. *Oklahoma*, 322 U. S. 596 (1944). In light of the maturation of our scruples against such techniques over the past 40 years, I believe such a result would be impossible today. See, *e. g.*, *Darwin* v. *Connecticut*, 391 U. S. 346, 350–351 (1968) (Harlan, J., concurring in part and dissenting in part). Yet today the Court cites

Nevertheless, prudent law enforcement officials must not now believe that they are wholly at liberty to refuse to give timely warnings and obtain effective waivers, confident that evidence derived from *Miranda* violations will be entirely immune from judicial scrutiny. I believe that most state and federal courts will continue to exercise the "learning, good sense, fairness and courage" they have displayed in administering the derivative-evidence rules prior to today's decision. *Nardone* v. *United States*, *supra*, at 342. Lower courts are free to interpret the Court's qualifications, grudging though they may be, as providing sufficient latitude to scrutinize confessions obtained in the wake of *Miranda* violations to determine whether, in light of all "the surrounding circumstances and the entire course of police conduct," the initial *Miranda* violation compromised the voluntariness of the accused's subsequent confession. *Ante*, at 318. Any overt

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Lyons as support for its "guilty secret" doctrine. *Ante*, at 311–312. Although I am confident that the entire Court would never sanction the multiple-confession technique employed in *Lyons*, I nevertheless respectfully submit that it is impossible to perceive any causal distinction between the "guilty secret" consequences of a confession that is presumptively coerced under *Miranda* and one that is actually coerced through torture.

use of the illegally secured statement by the police in obtaining the subsequent confession must of course be viewed as powerful evidence of a tainted connection; the Court itself asserts that the officers in this case did not "exploit the unwarned admission to pressure respondent" into giving his subsequent confession. *Ante*, at 316.[26] In such circumstances, "[h]aving 'released the spring' by using the petitioner's unlawfully obtained confessions against him, the Government must show that its illegal action did not induce his [subsequent statements]." *Harrison* v. *United States*, 392 U. S. 219, 224–225 (1968).

Moreover, courts must scrutinize the totality of the circumstances even where the authorities have not explicitly exploited the earlier confession. Many of the police practices discussed above do not rely on overt use of the earlier confession at all, but instead are implicit strategies that create leverage on the accused to believe he already has sealed his fate. See *supra*, at 328–332. These strategies are just as pernicious as overt exploitation of the illegal confession, because they just as surely are "calculated to undermine the suspect's ability to exercise his free will." *Ante*, at 309.[27] In evaluating the likely effects of such tactics, courts should continue to employ many of the same elements traditionally used in dissipation analysis. Thus, although the Court discounts the importance of a "break in the stream of events" in the context of the derivative-evidence *presumption*, the proximity in time and place of the first and second confessions surely remains a critical factor. See *supra*, at 339–341. So too does the inquiry into possible intervening events. *Supra*, at 341–342. And if the official violation of *Miranda* was flagrant, courts may fairly conclude that the violation was calculated and employed precisely so as to "undermine the suspect's ability to exercise his free will." *Ante*, at 309. See also *ante*, at 314 ("deliberately . . . improper tactics" warrant a presumption of compulsion).[28]

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[26] The Court's reliance on this qualification undermines the fallacious suggestion elsewhere in its opinion that an illegally obtained "guilty secret" may be used to secure a confession. *Ante*, at 312.

[27] See, *e. g.*, Pitler, 56 Calif. L. Rev., *supra* n. 16, at 617: "[P]olice could procure a confession absent the warnings, then take the suspect out for dinner, let him shower, shave, get a good twelve hours sleep, and the next day let two different officers warn and question him. The questioning need not even refer tangentially to the previous confession; for the suspect has those spoken words imprinted on his mind and assumes they can be used against him. Under such circumstances is any waiver the product of a free will and a rational intellect?"

In sum, today's opinion marks an evisceration of the established fruit of the poisonous tree doctrine, but its reasoning is sufficiently obscure and qualified as to leave state and federal courts with continued authority to combat obvious flouting by the authorities of the privilege against self-incrimination. I am confident that lower courts will exercise this authority responsibly, as they have for the most part prior to this Court's intervention.

II

Not content merely to ignore the practical realities of police interrogation and the likely effects of its abolition of the derivative-evidence presumption, the Court goes on to assert that nothing in the Fifth Amendment or the general judicial policy of deterring illegal police conduct "ordinarily" requires the suppression of evidence derived proximately from a confession obtained in violation of *Miranda*. The Court does not limit its analysis to successive confessions, but recurrently refers generally to the "fruits" of the illegal confession. *Ante*, at 306, 307, 308. Thus the potential impact of the Court's reasoning might extend far beyond the

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[28] In addition, the Court concedes that its new analysis does *not* apply where the authorities have ignored the accused's actual invocation of his *Miranda* rights to remain silent or to consult with counsel. *Ante*, at 312–314, n. 3. In such circumstances, courts should continue to apply the traditional presumption of tainted connection.

"cat out of the bag" context to include the discovery of physical evidence and other derivative fruits of *Miranda* violations as well.[29]

A

The Fifth Amendment requires that an accused in custody be informed of important constitutional rights before the authorities interrogate him. *Miranda* v. *Arizona*. This requirement serves to combat the "inherently compelling pressures" of custodial questioning "which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely," and is a prerequisite to securing the accused's informed and voluntary waiver of his rights. 384 U. S., at 467. Far from serving merely as a prophylactic safeguard, "[t]he requirement of warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privilege . . . ." *Id.*, at 476. It is precisely because this requirement embraces rights that are deemed to serve a "central role in the preservation of basic liberties," *Malloy* v. *Hogan*, 378 U. S. 1, 5 (1964), that it is binding on the States through the Fourteenth Amendment, *Miranda* v. *Arizona*, 384 U. S., at 467.

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[29] Notwithstanding the sweep of the Court's language, today's opinion surely ought not be read as also foreclosing application of the traditional derivative-evidence presumption to physical evidence obtained as a proximate result of a *Miranda* violation. The Court relies heavily on individual "volition" as an insulating factor in successive-confession cases. *Ante*, at 308–309, 314. Although the Court's reliance on this factor is clearly misplaced, see *supra*, at 328–332, the factor is altogether missing in the context of inanimate evidence.

As they have in successive-confession cases, most courts considering the issue have recognized that physical evidence proximately derived from a *Miranda* violation is presumptively inadmissible. See, *e. g.*, *United States* v. *Downing*, 665 F. 2d 404, 407–409 (CA1 1981); *United States* v. *Castellana*, 488 F. 2d 65, 67–68 (CA5 1974); *In re Yarber*, 375 So. 2d 1231, 1234–1235 (Ala. 1979); *People* v. *Braeseke*, 25 Cal. 3d, at 703–704, 602 P. 2d, at 391–392; *People* v. *Schader*, 71 Cal. 2d 761, 778–779, 457 P. 2d 841, 851–852 (1969); *State* v. *Lekas*, 201 Kan., at 588–589, 442 P. 2d, at 19–20; *State* v. *Preston*, 411 A. 2d 402, 407–408 (Me. 1980); *In re Appeal No. 245 (75)*, 29 Md. App. 131, 147–153, 349 A. 2d 434, 444–447 (1975); *Commonwealth* v. *White*, 374 Mass. 132, 138–139, 371 N. E. 2d 777, 781 (1977), aff'd by an equally divided Court, 439 U. S. 280 (1978); *People* v. *Oramus*, 25 N. Y. 2d 825, 826–827, 250 N. E. 2d 723, 724 (1969); *Commonwealth* v. *Wideman*, 478 Pa. 102, 104–107, 385 A. 2d 1334, 1335–1336 (1978); *Noble* v. *State*, 478 S. W. 2d 83, 84 (Tex. Crim. App. 1972); *State* v. *Badger*, 141 Vt., at 453–454, 450 A. 2d, at 349–350. Cf. *People* v. *Briggs*, 668 P. 2d 961, 962–963 (Colo. App. 1983); *State* v. *Williams*, 162 W. Va., at 318–319, 249 S. E. 2d, at 764.

Twice in the last 10 years, however, the Court has suggested that the *Miranda* safeguards are not themselves rights guaranteed by the Fifth Amendment. In *Michigan* v. *Tucker*, 417 U. S. 433 (1974), the Court stated that *Miranda* had only prescribed "recommended" procedural safeguards "to provide practical reinforcement for the right against compulsory self-incrimination," the violation of which may not necessarily violate the Fifth Amendment itself. 417 U. S., at 443–444. And in *New York* v. *Quarles*, 467 U. S. 649 (1984), the Court last Term disturbingly rejected the argument that a confession "must be *presumed* compelled because of . . . failure to read [the accused] his *Miranda* warnings." *Id.*, at 655, n. 5 (emphasis in original).

These assertions are erroneous. *Miranda*'s requirement of warnings and an effective waiver was not merely an exercise of supervisory authority over interrogation practices. As Justice Douglas noted in his *Tucker* dissent:

> "*Miranda*'s purpose was not promulgation of judicially preferred standards for police interrogation, a function we are quite powerless to perform; the decision enunciated '*constitutional* standards for protection of the privilege' against self-incrimination. 384 U. S., at 491." 417 U. S., at 465–466 (emphasis in original).

Miranda clearly emphasized that warnings and an informed waiver are essential to the Fifth Amendment privilege itself. See *supra*, at 347 and this page. As noted in *Tucker*, *Miranda* did state that the Constitution does not require "'adherence to any particular solution'" for providing the required knowledge and obtaining an informed waiver. 417 U. S., at 444 (quoting *Miranda, supra,* at 467). But to rely solely on this language in concluding that the *Miranda* warnings are not constitutional rights, as did the Court in *Tucker*, ignores the central issue. The Court in *Tucker* omitted to mention that in *Miranda*, after concluding that no "particular solution" is required, we went on to emphasize that "unless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it, the [prescribed] safeguards must be observed." *Miranda, supra,* at 467. Thus "the use of [any] admissions obtained in the absence of the required warnings [is] a flat violation of the Self-Incrimination Clause of the Fifth Amendment . . . ." *Orozco* v. *Texas*, 394 U. S. 324, 326 (1969).

The Court today finally recognizes these flaws in the logic of *Tucker* and *Quarles*.[30] Although disastrous in so many other respects, today's opinion at least has the virtue of rejecting the inaccurate assertion in *Quarles* that confessions extracted in violation of *Miranda* are not presumptively coerced for Fifth Amendment purposes. Cf. *Quarles, supra,* at 655, n. 5. Instead, the Court holds squarely that there is an "irrebuttable" presumption that such confessions are indeed coerced and are therefore inadmissible under the Fifth Amendment except in narrow circumstances. *Ante*, at 307.[31]

B

Unfortunately, the Court takes away with one hand far more than what it has given with the other. Although the

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[30] For an incisive critique of *Tucker*, see Stone, The Miranda Doctrine in the Burger Court, 1977 S. Ct. Rev. 99, 115–125.

[31] The exceptions are where a confession is used to impeach the defendant's trial testimony, *Harris* v. *New York*, 401 U. S. 222 (1971), and where *Miranda* warnings were not given because of "pressing public safety concerns," *ante*, at 317, citing *New York* v. *Quarles*, 467 U. S. 649 (1984).

Court concedes, as it must, that a confession obtained in violation of *Miranda* is irrebuttably presumed to be coerced and that the Self-Incrimination Clause therefore prevents its use in the prosecution's case in chief, *ante*, at 306–307, the Court goes on to hold that nothing in the Fifth Amendment prevents the introduction at trial of evidence proximately derived from the illegal confession. It contends, for example, that the Fifth Amendment prohibits introduction "only" of the "compelled testimony," and that this constitutional guarantee "is not concerned with nontestimonial evidence." *Ante*, at 304, 307.

This narrow compass of the protection against compelled self-incrimination does not accord with our historic understanding of the Fifth Amendment. Although the Self-Incrimination Clause "protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature," *Schmerber* v. *California*, 384 U. S. 757, 761 (1966), it prohibits the use of such communications "against" the accused in any way. The Fifth Amendment therefore contains a self-executing rule commanding the exclusion of evidence derived from such communications.[32] It bars "the use of compelled testimony, as well as evidence derived directly and indirectly therefrom," and "prohibits the prosecutorial authorities from using the compelled testimony in *any* respect." *Kastigar* v. *United States*, 406 U. S. 441, 453 (1972) (emphasis in original). If a coerced statement leads to "sources of information which may supply other means of convicting" the accused, those sources must also be suppressed. *Counselman* v. *Hitchcock*, 142 U. S. 547, 586 (1892). Under this constitutional exclusionary rule, the authorities are thus

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[32] The Court's reliance on *Schmerber* in support of its constricted view of the Fifth Amendment, *ante*, at 304, is wholly inappropriate. *Schmerber* had nothing to do with the derivative-evidence rule, but held only that the evidence compelled in the first instance in that case—blood samples—was nontestimonial in nature. 384 U. S., at 761.

"prohibited from making any . . . use of compelled testimony *and its fruits*" "in connection with a criminal prosecution against" the accused. *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52, 79 (1964) (emphasis added).[33]

In short, the Fifth Amendment's rule excluding "the use of compelled testimony and evidence derived therefrom is coextensive with the scope of the privilege" against self-incrimination itself. *Kastigar* v. *United States*, *supra*, at 452–453. "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used *at all*." *Silverthorne Lumber Co.* v. *United States*, 251 U. S., at 392 (emphasis added). If the authorities were permitted to use an accused's illegal confession to extract additional confessions or to uncover physical evidence against him, the use of these fruits at trial would violate the Self-Incrimination Clause just as surely as if the original confession itself were introduced. Yet that is precisely what today's decision threatens to encourage.

What possible justification does the Court advance for its evisceration of the Fifth Amendment's exclusionary rule in this context? Two rationales appear to be at work here. First, while acknowledging that a confession obtained in the absence of warnings and an informed waiver is irrebuttably presumed to be coerced in violation of the Self-Incrimination Clause, *ante*, at 307, the Court recurrently asserts elsewhere that the extraction of such a confession is not really "a Fifth Amendment violation," *ante*, at 306. Thus the Court suggests that a *Miranda* violation does not constitute "police infringement of a constitutional right," that it is not "a constitutional violation," that a suspect in such circumstances "suffer[s] no identifiable constitutional harm," and that his "Fifth Amendment rights" have not "actually [been] violated." *Ante*, at 304, 305, 307, 316. Similarly, the Court persists in reasoning that a confession obtained in violation of *Miranda* "ordinarily" should be viewed as "voluntary," a "voluntary disclosure of a guilty secret," "freely given," "noncoerc[ed]," and "wholly voluntary." *Ante*, at 311, 312, 318. I have already demonstrated the fallacy of this reasoning. See Part II–A, *supra*. Suffice it to say that the public will have understandable difficulty in comprehending how a confession obtained in violation of *Miranda* can at once be (1) "irrebuttabl[y]" presumed to be the product of official compulsion, and therefore suppressible as a matter of federal constitutional law, *ante*, at 307, 317, and (2) "noncoerc[ed]" and "wholly voluntary," *ante*, at 312, 318.

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[33] See also *United States* v. *Mandujano*, 425 U. S. 564, 576 (1976); *Maness* v. *Meyers*, 419 U. S. 449, 461 (1975); *Lefkowitz* v. *Turley*, 414 U. S. 70, 78 (1973) ("compelled answers and evidence derived therefrom" must be suppressed); *Ullmann* v. *United States*, 350 U. S. 422, 437 (1956) (Self-Incrimination Clause requires suppression of "knowledge and sources of information obtained from the compelled testimony"); *Hoffman* v. *United States*, 341 U. S. 479, 486 (1951); *Arndstein* v. *McCarthy*, 254 U. S. 71, 73 (1920).

Second, while not discussed in today's opinion, JUSTICE O'CONNOR has recently argued that the Fifth Amendment's exclusion of derivative evidence extends only to confessions obtained when the accused is compelled "to appear before a court, grand jury, or other such formal tribunal," and not merely when he is "subject to informal custodial police interrogation." *New York* v. *Quarles*, 467 U. S., at 670 (O'CONNOR, J., concurring in part in judgment and dissenting in part). An accused in this situation, it is argued, "has a much less sympathetic case for obtaining the benefit of a broad suppression ruling." *Ibid.*

Such an analysis overlooks that, by the time we decided *Miranda*, it was settled that the privilege against self-incrimination applies with full force outside the chambers of "formal" proceedings. "Today, then, there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves." *Miranda* v. *Arizona*, 384 U. S., at 467. See also

Ziang Sung Wan v. *United States*, 266 U. S. 1, 14–15 (1924) ("[A] confession obtained by compulsion must be excluded whatever may have been the character of the compulsion, and whether the compulsion was applied in a judicial proceeding *or otherwise*") (emphasis added); *Bram* v. *United States*, 168 U. S. 532 (1897). Thus there is no question that "all the principles embodied in the privilege apply to informal compulsion exerted by law-enforcement officers during in-custody questioning." *Miranda* v. *Arizona*, *supra*, at 461.

The application of the privilege to custodial interrogation simply reflects the realities and purposes of 20th-century police investigations, matters which the Court chooses to ignore. "[P]olice interrogation has in recent times performed the function once accomplished by interrogation of the defendant by the committing magistrate, a practice brought to an end by establishment of the rule against self-incrimination."[34] Moreover, "[a]s a practical matter, the compulsion to speak in the [police interrogation setting] may well be *greater* than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery." 384 U. S., at 461 (emphasis added).[35] In addition, there can be no legitimate dispute that an incriminating statement obtained through custodial interrogation "is as revealing of leads" and other derivative evidence as a statement compelled before a judicial tribunal. *Murphy* v. *Waterfront Comm'n*, 378 U. S., at 103 (WHITE, J., concurring). Accordingly, *Miranda* itself emphasized that, under the Fifth Amendment exclusionary rule, "*no evidence obtained as a result of interrogation* can be used against" the defendant unless he was warned of his rights and gave an effective waiver. 384 U. S., at 479 (emphasis added).[36]

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[34] LaFave & Israel, *supra* n. 17, § 6.5(a), p. 480, n. 13. See also Y. Kamisar, Police Interrogation and Confessions 48–55 (1980); Morgan, The Privilege Against Self-Incrimination, 34 Minn. L. Rev. 1, 27, 28 (1949): "The function which the police have assumed in interrogating an accused is exactly that of the early committing magistrates, and the opportunities for imposition and abuse are fraught with much greater danger . . . . Investigation by the police is not judicial, but when it consists of an examination of an accused, it is quite as much an official proceeding as the early English preliminary hearing before a magistrate, and it has none of the safeguards of a judicial proceeding. . . . [T]his surely is an area that needs inclusion for reasons infinitely more compelling than those applicable to the arraignment."

[35] Accord, *Kastigar* v. *United States*, 406 U. S. 441, 461 (1972). As we observed in *Miranda*, "[a]n individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion described above cannot be otherwise than under compulsion to speak." 384 U. S., at 461.

For these reasons, the Fifth Amendment itself requires the exclusion of evidence proximately derived from a confession obtained in violation of *Miranda*. The Court today has altogether evaded this constitutional command, the application of which should not turn simply on whether one is "sympathetic" to suspects undergoing custodial interrogation.

C

Even if I accepted the Court's conclusion that the Fifth Amendment does not command the suppression of evidence proximately derived from a *Miranda* violation, I would nevertheless dissent from the Court's refusal to recognize the importance of deterring *Miranda* violations in appropriate circumstances. Just last Term, in *United States* v. *Leon*, 468 U. S. 897 (1984), the Court held that while the Fourth Amendment does not *per se* require the suppression of evidence derived from an unconstitutional search, the exclusionary rule must nevertheless be invoked where the search was objectively unreasonable. *Id.*, at 919–920, n. 20. Although

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[36] Justices Clark and Harlan, dissenting in *Miranda*, recognized the applicability of the derivative-evidence rule. See, *e. g.*, *id.*, at 500 (Clark, J., dissenting in part and concurring in part in result) ("[F]ailure to follow the new procedures requires inexorably the exclusion of any statement by the accused, as well as the fruits thereof"); *id.*, at 522 (Harlan, J., dissenting). But see *id.*, at 545 (WHITE, J., dissenting) (question remains open).

I do not share the Court's view of the Fourth Amendment,[37] *Leon* at least had the virtue of recognizing that exclusion of derivative evidence is essential to the effective deterrence of objectively unreasonable failures by the authorities to obey the law. *Ibid.*

The Court today refuses to apply the derivative-evidence rule even to the extent necessary to deter objectively unreasonable failures by the authorities to honor a suspect's *Miranda* rights. Incredibly, faced with an obvious violation of *Miranda,* the Court asserts that it will not countenance suppression of a subsequent confession in such circumstances where the authorities have acted "legitimate[ly]" and have not used "improper tactics." *Ante,* at 312, 314. One can only respond: whither went *Miranda?*

The Court contends, however, that *Michigan* v. *Tucker,* 417 U. S. 433 (1974), already decided that the failure of the authorities to obey *Miranda* should not be deterred by application of the derivative-evidence rule. *Ante,* at 308–309. *Tucker* did *not* so decide. After criticizing the Fifth Amendment basis for exclusion, the Court in *Tucker* went on to note another " 'prime purpose' " for the exclusion of evidence—" 'to deter future unlawful police conduct and thereby effectuate the guarantee[s]' " of the Constitution. 417 U. S., at 446 (citation omitted). The Court emphasized that "[i]n a proper case this rationale would seem applicable to the Fifth Amendment context as well." *Id.,* at 447. Anticipating *Leon,* however, the Court asserted that the "deterrent purpose" was applicable only where "the police have engaged in willful, or at the very least negligent, conduct . . . ." 417 U. S, at 447. Because the questioning in *Tucker* occurred *before* *Miranda* was announced and was otherwise conducted in an objectively reasonable manner, the exclusion of the derivative evidence solely for failure to comply with the then-nonexistent *Miranda* requirement would not significantly deter future *Miranda* violations. As the Court noted, the "deterrence rationale loses much of its force" when there is nothing to deter. 417 U. S, at 447.

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[37] See *United States* v. *Leon,* 468 U. S., at 928 (BRENNAN, J., dissenting).

Far from rejecting the derivative-evidence rule, *Tucker* thus expressly invited its application in "a proper case" when the authorities have acted unreasonably. *Ibid.* Nearly every court and commentator considering the issue have correctly recognized that *Tucker's* logic and its reliance on the Fourth Amendment "good faith" analysis compel the exclusion of derivative evidence where the police have deliberately, recklessly, or negligently violated the Fifth Amendment requirement of warnings and an effective waiver.[38]

Thus the Court's assertion today that *Tucker's* "reasoning applies with equal force" to preclude application of the derivative-evidence rule in this case is a gross mischaracterization. *Ante*, at 308. If the police acted in an objectively unreasonable manner, see Part II–D, *infra*, *Tucker's* "reasoning" instead requires suppression of Elstad's subsequent statement.

The Court clearly errs in suggesting that suppression of the "unwarned admission" alone will provide meaningful deterrence. *Ante*, at 309. The experience of lower courts demonstrates that the police frequently have refused to comply with *Miranda* precisely in order to obtain incriminating statements that will undermine the voluntariness of the accused's decision to speak again once he has received the usual warnings; in such circumstances, subsequent confessions often follow on a "silver platter." *Cagle* v. *State*, 45 Ala. App., at 4, 221 So. 2d, at 120. See generally *supra*, at 329–332. Expert interrogators themselves recognize the direct connection between such statements. *Supra*, at 328–329. And the Court's suggestion that its analysis might apply generally to "fruits" of illegal interrogations, but see n. 29, *supra*, blinks reality even further. For example, expert interrogators acknowledge that confessions are "'the prime source of other evidence.'"[39] If the police through illegal interrogation could discover contraband and be confident that the contraband "ordinarily" would not be suppressed, what possible incentive would they have to obey *Miranda?*

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[38] See, *e. g.*, *United States* v. *Downing*, 665 F. 2d, at 407; *State* v. *Preston*, 411 A. 2d, at 407–408 ("[I]f the rationale of the majority in *Tucker* is followed, it becomes important to determine in each such case of derivative evidence whether, in the circumstances, enforcement of the exclusionary rule has some tendency to deter the police from engaging in conduct violating the fifth and sixth amendment rights of the accused"); *In re Appeal No. 245 (75)*, 29 Md. App., at 150–151, 349 A. 2d, at 445–446; Comment, 41 Brooklyn L. Rev., *supra* n. 21, at 339–340; Comment, 24 Clev. St. L. Rev. 689, 692–694 (1975).

The Court simply has not confronted the basic premise of the derivative-evidence rule: that "[t]o forbid the direct use of methods . . . but to put no curb on their full indirect use would only invite the very methods deemed 'inconsistent with ethical standards and destructive of personal liberty.'" *Nardone* v. *United States*, 308 U. S., at 340.

> "[I]t is clear that if the police were permitted to utilize illegally obtained confessions for links and leads rather than being required to gather evidence independently, then the *Miranda* warnings would be of no value in protecting the privilege against self-incrimination. The requirement of a warning would be meaningless, for the police would be permitted to accomplish indirectly what they could not accomplish directly, and there would exist no incentive to warn." Pitler, 56 Calif. L. Rev., *supra* n. 16, at 620.

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[39] C. O'Hara & G. O'Hara, Fundamentals of Criminal Investigation 131 (5th ed. 1980). See also Aubry & Caputo, *supra* n. 8, at 24–25; *id.*, at 27–28 ("Interrogation is valuable in developing information leading to the recovery of the fruits of the crime. . . . The process of interrogation ideally lends itself to the accomplishment of the recovery of the fruits of the crime, particularly in the areas of stolen property, contraband, and money"); O. Stephens, The Supreme Court and Confessions of Guilt 192 (1973) (survey-research findings).

As the Executive Director of the National District Attorneys Association Foundation emphasized shortly after *Miranda*, merely to exclude the statement itself while putting no curbs on the admission of derivative evidence "would destroy the whole basis for the rule in the first instance." Nedrud, The New Fifth Amendment Concept: Self-Incrimination Redefined, 2 J. Nat. Dist. Att. Assn. Found. 112, 114 (1966).[40] Yet that is precisely the result that today's disastrous opinion threatens to encourage. How can the Court possibly expect the authorities to obey *Miranda* when they have every incentive now to interrogate suspects without warnings or an effective waiver, knowing that the fruits of such interrogations "ordinarily" will be admitted, that an admissible subsequent confession "ordinarily" can be obtained simply by reciting the *Miranda* warnings shortly after the first has been procured and asking the accused to repeat himself, and that unless the accused can demonstrate otherwise his confession will be viewed as an "act of free will" in response to "legitimate law enforcement activity"? *Ante*, at 311, 312. By condoning such a result, the Court today encourages practices that threaten to reduce *Miranda* to a mere "form of words," *Silverthorne Lumber Co.* v. *United States*, 251 U. S., at 392, and it is shocking that the Court nevertheless disingenuously purports that it "in no way retreats" from the *Miranda* safeguards, *ante*, at 317.

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[40] "What is the point of formulating comprehensive rules as the Court did in *Miranda* if the police still have a substantial incentive to continue to disregard these rules, if the police can still make use of all the leads and clues stemming from the inadmissible statements or confessions? You are not going to influence police practices greatly, you are not likely to get the police to change their procedures, if you permit them to operate on the premise that even if they pay no attention to *Miranda* they can still obtain and introduce in a trial valuable evidence derived from the suspect's statements.

. . . . .

". . . We should ask: Would admitting evidence or permitting testimony obtained under these circumstances give the police a significant incentive to act illegally?" A New Look At Confessions: Escobedo—The Second Round 150, 156 (B. George ed. 1967) (remarks of Professor Yale Kamisar).

See also Dershowitz & Ely, *Harris* v. *New York:* Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority, 80 Yale L. J. 1198, 1220 (1971); Pitler, 56 Calif. L. Rev., *supra* n. 16, at 619 ("There appears no logical reason to permit the fruits of a *Miranda* violation to be admissible. Any other holding, despite the cries of the disastrous effects on law enforcement, would emasculate the rights granted by *Miranda*") (footnote omitted).

D

Not content with its handiwork discussed above, the Court goes on and devotes considerable effort to suggesting that, "[u]nfortunately," *Miranda* is such an inherently "slippery," "murky," and "difficult" concept that the authorities in general, and the police officer conducting the interrogation in this case in particular, cannot be faulted for failing to advise a suspect of his rights and to obtain an informed waiver. *Ante*, at 309, 316. *Miranda* will become "murky," however, only because the Court's opinion today threatens to become a self-fulfilling prophecy. Although borderline cases occasionally have arisen respecting the concepts of "custody" and "interrogation," until today there has been nothing "slippery," "murky," or "difficult" about *Miranda* in the overwhelming majority of cases. The whole point of the Court's work in this area has been to prescribe "bright line" rules to give clear guidance to the authorities.[41]

Rather than acknowledge that the police in this case clearly broke the law, the Court bends over backwards to suggest why the officers may have been justified in failing to obey *Miranda*.

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[41] *Solem* v. *Stumes*, 465 U. S. 638, 646–647 (1984). See also *Smith* v. *Illinois*, 469 U. S. 91 (1984) *(per curiam)*; *Edwards* v. *Arizona*, 451 U. S. 477 (1981); *Fare* v. *Michael C.*, 442 U. S. 707, 718 (1979). See also Schulhofer, Confessions and the Court, 79 Mich. L. Rev. 865, 879 (1981) (although there "was some potential ambiguity at the fringes of 'custody' and 'interrogation,'" the Court in *Miranda* had "taken a big step toward clarifying the ground rules of permissible interrogation" and "provided plenty of guidance for the police").

First. The Court asserts that "[n]either the environment nor the manner of either 'interrogation' was coercive," noting that the initial interrogation took place in Elstad's "own home." *Ante*, at 315. The Court also believes that, "[a]lthough in retrospect the officers testified that respondent was then in custody, at the time he made his statement he had not been informed that he was under arrest." *Ibid.* There is no question, however, that Michael Elstad was in custody and "deprived of his freedom of action in [a] significant way" at the time he was interrogated. *Miranda* v. *Arizona*, 384 U. S., at 444. Two police officers had entered his bedroom, ordered him to get out of bed and come with them, stood over him while he dressed, taken him downstairs, and separated him from his mother. Tr. 64–65, 74–75, 80–84. The officers themselves acknowledged that Elstad was then under arrest. *Id.*, at 81–82. Moreover, we have made clear that police interrogation of an accused in custody triggers the *Miranda* safeguard even if he is in the "familiar surroundings" of his own home, precisely because he is no less " 'deprived of his freedom of action' " there than if he were at a police station. *Orozco* v. *Texas*, 394 U. S., at 326–327 (citation omitted).

Thus because Elstad was in custody, the circumstances of his interrogation were *inherently* coercive, and the Court once again flouts settled law in suggesting otherwise. "[W]ithout proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Miranda* v. *Arizona*, 384 U. S., at 467. The Fifth Amendment's requirement of warnings and an informed waiver is "an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere." *Id.*, at 468.

Second. Without anything in the record to support its speculation, the Court suggests that Officer Burke's violation of *Miranda* "may have been the result of confusion as to whether the brief exchange qualified as 'custodial interrogation' . . . ." *Ante*, at 315. There was no confusion on this point until today. Burke made Elstad sit down and, standing over him, said "[y]ou know why we're here," asked if he knew the Gross family, and "asked what he knew about the burglary." Tr. 83–84. This questioning obviously constituted interrogation because it was "reasonably likely to evoke an incriminating response" from Elstad, as it did. *Rhode Island* v. *Innis*, 446 U. S. 291, 301 (1980).

Third. The Court contends that the interrogation might be excusable because "the brief stop in the living room before proceeding to the station house was not to interrogate the suspect but to notify his mother of the reason for his arrest." *Ante*, at 315. Officer Burke's partner did take Elstad's mother into the kitchen to inform her of the charges, but Burke took Elstad into another room, sat him down, and interrogated him concerning "what he knew about the burglary." Tr. 84. How can the Court possibly describe this interrogation as merely informing Elstad's mother of his arrest?

Finally. The Court suggests that Burke's violation of Elstad's Fifth Amendment rights "may simply have reflected Burke's reluctance to initiate an alarming police procedure before McAllister had spoken with respondent's mother." *Ante*, at 315–316. As the officers themselves acknowledged, however, the fact that they "[took] the young fellow out of bed" had "[o]bviously" already created "tension and stress" for the mother, Tr. 64, which surely was not lessened when she learned that her son was under arrest. And if Elstad's mother was in earshot, as the Court assumes, it is difficult to perceive how listening to the *Miranda* warnings would be any more "alarming" to her than what she actually heard—actual interrogation of her son, including Burke's direct accusation that the boy had committed a felony. Most importantly, an individual's constitutional rights should not turn on whether his relatives might be upset. Surely there is no "tender feelings" exception to the Fifth Amendment privilege against self-incrimination.[42]

III

The Court's decision today vividly reflects its impatience with the constitutional rights that the authorities attack as standing in the way of combating crime. But the States that adopted the Bill of Rights struck that balance and it is not for this Court to balance the Bill of Rights away on a cost/benefit scale "where the 'costs' of excluding illegally obtained evidence loom to exaggerated heights and where the 'benefits' of such exclusion are made to disappear with a mere wave of the hand." *United States* v. *Leon*, 468 U. S., at 929 (BRENNAN, J., dissenting). It is precisely in that vein, however, that the Court emphasizes that the subsequent confession in this case was "voluntary" and "highly probative evidence," that application of the derivative-evidence presumption would cause the confession to be "irretrievably lost," and that such a result would come at an impermissibly "high cost to legitimate law enforcement activity." *Ante*, at 312.

Failure of government to obey the law cannot ever constitute "legitimate law enforcement activity." In any event, application of the derivative-evidence presumption does not

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[42] If the Court means to suggest otherwise, the authorities would be well advised to arrest and interrogate suspects in the presence of loved ones so as to avoid the traumatizing need to obey *Miranda*. This procedure would fit in well with a classic interrogation ploy—the "you're just hurting yourself and your loved ones" technique. See, *e. g.*, Aubry & Caputo, *supra* n. 8, at 235: "The direct implication about hurting the loved ones can be made by statements to the effect of 'What are your wife and children going to think about you when they find out about this?' 'What are your kids going to think of their father?' The subject has most probably thought of little else since he was apprehended, and having these ideas forcefully brought to his attention by the interrogator is going to increase and intensify these fears and anxieties." See also W. Dienstein, Technics for the Crime Investigator 116 (2d ed. 1974).

"irretrievably" lead to suppression. If a subsequent confession is truly independent of earlier, illegally obtained confessions, nothing prevents its full use to secure the accused's conviction. If the subsequent confession *did* result from the earlier illegalities, however, there is nothing "voluntary" about it. And even if a tainted subsequent confession is "highly probative," we have never until today permitted probity to override the fact that the confession was "the product of constitutionally impermissible methods in [its] inducement." *Rogers* v. *Richmond*, 365 U. S. 534, 541 (1961). In such circumstances, the Fifth Amendment makes clear that the prosecutor has *no* entitlement to use the confession in attempting to obtain the accused's conviction.[43]

The lesson of today's decision is that, at least for now, what the Court decrees are "legitimate" violations by authorities of the rights embodied in *Miranda* shall "ordinarily" go undeterred. It is but the latest of the escalating number of decisions that are making this tribunal increasingly irrelevant in the protection of individual rights, and that are requiring other tribunals to shoulder the burden.[44] "There is hope, however, that in time this or some later Court will restore these precious freedoms to their rightful place as a primary protection for our citizens against overreaching officialdom." *United States* v. *Leon*, *supra*, at 960 (BRENNAN, J., dissenting).

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[43] "The exclusion of an illegally procured confession and of any testimony obtained in its wake deprives the Government of nothing to which it has any lawful claim and creates no impediment to legitimate methods of investigating and prosecuting crime. On the contrary, the exclusion of evidence causally linked to the Government's illegal activity no more than restores the situation that would have prevailed if the Government had itself obeyed the law." *Harrison* v. *United States*, 392 U. S., at 224, n. 10.

[44] "In light of today's erosion of *Miranda* standards as a matter of federal constitutional law, it is appropriate to observe that no State is precluded by the decision from adhering to higher standards under state law. Each State has power to impose higher standards governing police practices under state law than is required by the Federal Constitution. . . . Understandably, state courts and legislatures are, as matters of state law, increasingly according protections once provided as federal rights but now increasingly depreciated by decisions of this Court." *Michigan* v. *Mosley*, 423 U. S. 96, 120–121 (1975) (BRENNAN, J., dissenting).

I dissent.

JUSTICE STEVENS, dissenting.

The Court concludes its opinion with a carefully phrased statement of its holding:

> "We hold today that a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings." *Ante*, at 318.

I find nothing objectionable in such a holding. Moreover, because the Court expressly endorses the "bright-line rule of *Miranda*," which conclusively presumes that incriminating statements obtained from a suspect in custody without administering the required warnings are the product of compulsion,[1] and because the Court places so much emphasis on the special facts of this case, I am persuaded that the Court intends its holding to apply only to a narrow category of cases in which the initial questioning of the suspect was made in a totally uncoercive setting and in which the first confession obviously had no influence on the second.[2] I nevertheless dissent because even such a narrowly confined exception is inconsistent with the Court's prior cases, because the attempt to identify its boundaries in future cases will breed confusion and uncertainty in the administration of criminal justice, and because it denigrates the importance of one of the core constitutional rights that protects every American citizen from the kind of tyranny that has flourished in other societies.

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[1] "When police ask questions of a suspect in custody without administering the required warnings, *Miranda* dictates that the answers received be presumed compelled and that they be excluded from evidence at trial in the State's case in chief. The Court has carefully adhered to this principle, permitting a narrow exception only where pressing public safety concerns demanded. See *New York* v. *Quarles*, 467 U. S., at 655–656. The Court today in no way retreats from the bright-line rule of *Miranda*." *Ante*, at 317.

[2] The Court emphasizes the noncoercive setting in which the initial interview occurred, *ante*, at 300–301, 315; the apparent candor of the respondent during both of his interviews with the police, *ante*, at 301–302; and the absence of any evidence suggesting that the second confession was motivated by the first, *ante*, at 315–316. Further, the Court characterizes

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The desire to achieve a just result in this particular case has produced an opinion that is somewhat opaque and internally inconsistent. If I read it correctly, its conclusion rests on two untenable premises: (1) that the respondent's first confession was not the product of coercion;[3] and (2) that no constitutional right was violated when respondent was questioned in a tranquil, domestic setting.[4]

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the first confession as "patently *voluntary*," *ante*, at 307 (emphasis in original), because it was not the product of any "physical violence or other deliberate means calculated to break the suspect's will," *ante*, at 312. Moreover, the Court—apparently not satisfied that the State has conceded that respondent was in custody at the time of the unwarned admission, *ante*, at 315—launches into an allegedly fact-based discussion of this "issue," going out of its way to speculate about the probable good faith of the officers. See *ante*, at 315–316 ("This breach may have been the result of confusion as to whether the brief exchange qualified as 'custodial interrogation' or it may simply have reflected Burke's reluctance to initiate an alarming police procedure before McAllister had spoken with respondent's mother"). Finally, the Court makes its own finding that the failure to give *Miranda* warnings was an "oversight." *Ante*, at 316.

[3] *Ante*, at 309 ("It is an unwarranted extension of *Miranda* to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period"); *ante*, at 311 ("*voluntary* unwarned admissions") (emphasis in original); *ante*, at 312 ("When neither the initial nor the subsequent admission is coerced"); *ante*, at 314 ("absent deliberately coercive or improper tactics in obtaining the initial statement").

[4] *Ante*, at 304 (rejecting contention that "a failure to administer *Miranda* warnings necessarily breeds the same consequences as police infringement

Even before the decision in *Miranda* v. *Arizona*, 384 U. S. 436 (1966), it had been recognized that police interrogation of a suspect who has been taken into custody is presumptively coercive. That presumption had its greatest force when the questioning occurred in a police station, when it was prolonged, and when there was evidence that the prisoner had suffered physical injury. To rebut the presumption, the prosecutor had the burden of proving the absence of any actual coercion.[5] Because police officers are generally more credible witnesses than prisoners and because it is always difficult for triers of fact to disregard evidence of guilt when addressing a procedural question, more often than not the presumption of coercion afforded only slight protection to the accused.

The decision in *Miranda* v. *Arizona* clarified the law in three important respects. First, it provided the prosecutor with a simple method of overcoming the presumption of coercion.[6] If the police interrogation is preceded by the warning specified in that opinion, the usual presumption does not attach. Second, it provided an important protection to the accused by making the presumption of coercion irrebuttable if the prescribed warnings are not given.[7] Third, the decision

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of a constitutional right"); *ante*, at 305 ("Respondent's contention that his confession was tainted by the earlier failure of the police to provide *Miranda* warnings and must be excluded as 'fruit of the poisonous tree' assumes the existence of a constitutional violation"); *ante*, at 306 ("[A] procedural *Miranda* violation differs in significant respects from violations of the Fourth Amendment"); *ibid.* ("The *Miranda* exclusionary rule, however, serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself"); *ante*, at 318 ("[T]here is no warrant for presuming coercive effect where the suspect's initial inculpatory statement, though technically in violation of *Miranda*, was voluntary").

[5] See, *e. g.*, *People* v. *La Frana*, 4 Ill. 2d 261, 268, 122 N. E. 2d 583, 586–587 (1954); cf. *People* v. *Nemke*, 23 Ill. 2d 591, 601, 179 N. E. 2d 825, 830 (1962).

[6] 384 U. S., at 444–445.

[7] *Id.*, at 444 ("[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defend-

made it clear that a self-incriminatory statement made in response to custodial interrogation was always to be considered "compelled" within the meaning of the Fifth Amendment to the Federal Constitution if the interrogation had not been preceded by appropriate warnings.[8] Thus the irrebuttable presumption of coercion that applies to such a self-incriminatory statement, like a finding of actual coercion, renders the resulting confession inadmissible as a matter of federal constitutional law.[9]

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ant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination"); *id.*, at 467–469.

[8] *Id.*, at 445, 448, 457–458 ("Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice").

[9] In 1964, the Court held that the "Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence." *Malloy* v. *Hogan*, 378 U. S. 1, 8. Two years later, in *Miranda* v. *Arizona*, 384 U. S. 436 (1966), the Court held that the State of Arizona had deprived Miranda of his liberty without due process of law because his conviction was based on a confession that had been obtained in violation of his Fifth Amendment privilege against self-incrimination. Obviously, the Court's power to reverse Miranda's conviction rested entirely on the determination that a violation of the Federal Constitution had occurred.

The constitutional violation was established without any evidence that the police actually coerced Miranda in any way. *Id.*, at 445, 491–492. The fact that Miranda had confessed while he was in custody and without having been adequately advised of his right to remain silent was sufficient to establish the constitutional violation. To phrase it another way, the absence of an adequate warning plus the fact of custody created an irrebuttable presumption of coercion. *Id.*, at 492. Thus, the Court wrote:

"To be sure, the records do not evince overt physical coercion or patent psychological ploys. The fact remains that in none of these cases did the officers undertake to afford appropriate safeguards at the outset of the interrogation to insure that the statements were truly the product of free choice." *Id.*, at 457.

[Footnote 9 is continued on p. 368]

In my opinion, the Court's attempt to fashion a distinction between actual coercion "by physical violence or other deliberate means calculated to break the suspect's will," *ante*, at 312, and irrebuttably presumed coercion cannot succeed. The presumption is only legitimate if it is assumed that there is always a coercive aspect to custodial interrogation that is not preceded by adequate advice of the constitutional right to remain silent. Although I would not support it, I could understand a rule that refused to apply the presumption unless the interrogation took place in an especially coercive setting—perhaps only in the police station itself—but if the presumption arises whenever the accused has been taken into custody or his freedom has been restrained in any significant way, it will surely be futile to try to develop subcategories of custodial interrogation.[10] Indeed, a major purpose of treating the presumption of coercion as irrebuttable is to avoid the kind of fact-bound inquiry that today's decision will surely engender.[11]

As I read the Court's opinion, it expressly accepts the proposition that routine *Miranda* warnings will not be sufficient to overcome the presumption of coercion and thereby make a second confession admissible when an earlier confession is tainted by coercion "by physical violence or other

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See also *id.*, at 448 ("[T]his Court has recognized that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition"); *id.*, at 477.

[10] Of course, in *Orozco* v. *Texas*, 394 U. S. 324 (1969), this Court rejected the contention that *Miranda* warnings were inapplicable because a defendant "was interrogated on his own bed, in familiar surroundings." *Id.*, at 326–327.

[11] *Miranda* v. *Arizona*, 384 U. S., at 468; *New York* v. *Quarles*, 467 U. S. 649, 664 (1984) (O'CONNOR, J., concurring in part in judgment and dissenting in part) ("When police ask custodial questions without administering the required warnings, *Miranda* quite clearly requires that the answers received be presumed compelled and that they be excluded from evidence at trial"); *Orozco* v. *Texas*, 394 U. S., at 324.

deliberate means calculated to break the suspect's will."[12] Even in such a case, however, it is not necessary to assume that the earlier confession will always "effectively immunize" a later voluntary confession. But surely the fact that an earlier confession was obtained by unlawful methods should add force to the presumption of coercion that attaches to subsequent custodial interrogation and should require the prosecutor to shoulder a heavier burder of rebuttal than in a routine case. Simple logic, as well as the interest in not providing an affirmative incentive to police misconduct, requires that result. I see no reason why the violation of a rule that is as well recognized and easily administered as the duty to give *Miranda* warnings should not also impose an additional burden on the prosecutor.[13] If we are faithful to the holding in

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[12] *Ante,* at 312; see also *ante,* at 314 ("We must conclude that, absent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion").

[13] In view of the Court's holding, it is not necessary to consider how that additional burden should be discharged in all cases. In general, however, I should think that before the second session of custodial interrogation begins, the prisoner should be advised that his earlier statement is, or may be, inadmissible. I am not persuaded that the *Miranda* rule is so "murky," *ante,* at 316, that the law enforcement profession would be unable to identify the cases in which a supplementary warning would be appropriate. *Miranda* was written, in part, "to give concrete constitutional guidelines for law enforcement agencies and courts to follow." 384 U. S., at 441–442; *id.*, at 468 (noting that the "Fifth Amendment privilege is *so fundamental* to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege *so simple*") (emphasis added). Nearly two decades after that disposition, it is undisputed that the *Miranda* rule—now so deeply embedded in our culture that most schoolchildren know not only the warnings, but also when they are required—has given that clarity. See *New York* v. *Quarles*, 467 U. S., at 660 (O'CONNOR, J., concurring in part in judgment and dissenting in part) (noting *Miranda*'s "now clear strictures"); *Rhode Island* v. *Innis*, 446 U. S. 291, 304 (1980) (BURGER, C. J., concurring in judgment) (the "meaning of *Miranda* has become reasonably clear and law enforcement

Miranda itself, when we are considering the admissibility of evidence in the prosecutor's case in chief, we should not try to fashion a distinction between police misconduct that warrants a finding of actual coercion and police misconduct that establishes an irrebuttable presumption of coercion.

II

For me, the most disturbing aspect of the Court's opinion is its somewhat opaque characterization of the police misconduct in this case. The Court appears ambivalent on the question whether there was any constitutional violation.[14] This ambivalence is either disingenuous or completely lawless. This Court's power to require state courts to exclude probative self-incriminatory statements rests entirely on the premise that the use of such evidence violates the Federal Constitution.[15] The same constitutional analysis applies

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practices have adjusted to its strictures"); *Fare* v. *Michael C.*, 442 U. S. 707, 717 (1979) ("The rule the Court established in *Miranda* is clear"); Stephens, Flanders, & Cannon, Law Enforcement and the Supreme Court: Police Perceptions of the *Miranda* Requirements, 39 Tenn. L. Rev. 407, 431 (1972). At the same time, it has ensured the right to be free from self-incrimination that the Constitution guarantees to all. Moreover, many professionals are convinced that, rather than hampering law enforcement, the *Miranda* rule has helped law enforcement efforts. See Jacobs, The State of *Miranda*, Trial 45 (Jan. 1985) ("[I]ncreased professionalism of police . . . has resulted from the challenging combination of *Miranda* and *Gideon* v. *Wainwright* [and] has benefited both police and prosecutors in preparing good cases"). Nevertheless, the Court today blurs *Miranda*'s clear guidelines. The author of today's opinion—less than one Term ago—summarized precisely my feelings about the Court's disposition today: "*Miranda* is now the law, and in my view, the Court has not provided sufficient justification for departing from it or for blurring its now clear strictures." *New York* v. *Quarles*, 467 U. S., at 660 (O'CONNOR, J., concurring in part in judgment and dissenting in part).

[14] See n. 4, *supra*. Indeed, the Court's holding rests on its view that there were no "improper tactics in obtaining the initial statement." See *ante*, at 314.

[15] At least that is my view. In response to this dissent, however, the Court has added a footnote, *ante*, at 306–307, n. 1, implying that whenever

whether the custodial interrogation is actually coercive or irrebuttably presumed to be coercive. If the Court does not accept that premise, it must regard the holding in the *Miranda* case itself, as well as all of the federal jurisprudence that has evolved from that decision, as nothing more than an illegitimate exercise of raw judicial power.[16] If the Court accepts the proposition that respondent's self-incriminatory statement was inadmissible, it must also acknowledge that the Federal Constitution protected him from custodial police interrogation without first being advised of his right to remain silent.

The source of respondent's constitutional protection is the Fifth Amendment's privilege against compelled self-incrimination that is secured against state invasion by the Due Process Clause of the Fourteenth Amendment. Like many other provisions of the Bill of Rights, that provision is merely a procedural safeguard. It is, however, the specific provision that protects all citizens from the kind of custodial interrogation that was once employed by the Star Chamber,[17] by "the Germans of the 1930's and early 1940's," [18] and by some of our own police departments only a few decades ago.[19]

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the Court commands exclusion of a presumptively coerced confession, it is standing—not on a constitutional predicate—but merely on its own shoulders.

[16] The *Miranda* Court explicitly recognized the contrary when it stated that "our holding is not an innovation in our jurisprudence, but is an application of principles long recognized and applied in other settings." 384 U. S., at 442. See also *id.*, at 445 ("The constitutional issue we decide in each of these cases is the admissibility of statements obtained from a defendant questioned while in custody or otherwise deprived of his freedom of action in any significant way"); *id.*, at 460–467.

[17] See *id.*, at 458–459; E. Cleary, McCormick on Evidence § 114 (2d ed. 1972); 8 J. Wigmore, Evidence § 2250 (McNaughton rev. ed. 1961).

[18] See Burger, Who Will Watch the Watchman, 14 Am. U. L. Rev. 1, 14 (1964).

[19] See, *e. g.*, *Leyra* v. *Denno*, 347 U. S. 556 (1954); *Malinski* v. *New York*, 324 U. S. 401 (1945); *Ashcraft* v. *Tennessee*, 322 U. S. 143 (1944); *Ward* v. *Texas*, 316 U. S. 547 (1942); *Vernon* v. *Alabama*, 313 U. S. 547

Custodial interrogation that violates that provision of the Bill of Rights is a classic example of a violation of a constitutional right.

I respectfully dissent.

(1941); *White* v. *Texas*, 310 U. S. 530 (1940); *Canty* v. *Alabama*, 309 U. S. 629 (1940); *Chambers* v. *Florida*, 309 U. S. 227 (1940); *Brown* v. *Mississippi*, 297 U. S. 278 (1936); *Wakat* v. *Harlib*, 253 F. 2d 59 (CA7 1958); *People* v. *La Frana*, 4 Ill. 2d 261, 122 N. E. 2d 583 (1954); cf. *People* v. *Portelli*, 15 N. Y. 2d 235, 205 N. E. 2d 857 (1965) (potential witness tortured by police). Such custodial interrogation is, of course, closer to that employed by the Soviet Union than that which our constitutional scheme tolerates. See *Coleman* v. *Alabama*, 399 U. S. 1, 15–16 (1970) (opinion of Douglas, J.) ("In [Russia] detention *incommunicado* is the common practice, and the period of permissible detention now extends for nine months. Where there is custodial interrogation, it is clear that the critical stage of the trial takes place long before the courtroom formalities commence. That is apparent to one who attends criminal trials in Russia. Those that I viewed never put in issue the question of guilt; guilt was an issue resolved in the inner precincts of a prison under questioning by the police").

MARRESE ET AL. v. AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 83–1452. Argued December 4, 1984—Decided March 4, 1985

After being denied membership in respondent American Academy of Orthopaedic Surgeons, petitioner orthopaedic surgeons each filed an action in an Illinois Circuit Court, alleging that the denial of membership violated their associational rights under Illinois common law. After the Illinois Appellate Court ultimately held that the complaint in one action failed to state a cause of action, the Circuit Court then dismissed the other complaint. Subsequently, petitioners filed an action in Federal District Court, alleging that the denial of membership constituted a boycott in violation of § 1 of the Sherman Act. Respondent filed a motion to dismiss on the ground that claim preclusion barred the federal antitrust claim because the state actions concerned the same facts and were dismissed with prejudice. The District Court denied the motion, holding, in reliance on federal law, that the state judgments did not bar the Sherman Act claim. Thereafter, the District Court held respondent in criminal contempt for refusing to comply with a discovery order as to its membership application files. Respondent then appealed from the contempt order, and, while this appeal was pending, the District Court certified its denial of the motion to dismiss for immediate appeal. The Court of Appeals authorized an interlocutory appeal and ordered it consolidated with the appeal from the contempt order. Ultimately, the Court of Appeals held that, as a matter of federal law, claim preclusion barred the federal antitrust action, and reversed the contempt order because the discovery order was invalid.

Held:

1. The Court of Appeals had jurisdiction to review the District Court's denial of the motion to dismiss. The pendency of the appeal from the contempt order did not prevent the District Court from certifying such denial for immediate appeal. Pp. 378–379.

2. The courts below erred in not considering Illinois law in determining the preclusive effect of the state judgments. Pp. 379–386.

(a) Title 28 U. S. C. § 1738—which provides that state judicial proceedings "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken"—requires a federal court to look first to state law in determining the preclusive effects of a state-court judgment. *Kremer* v. *Chemical Construction Corp.*, 456 U. S. 461. The fact that petitioners' antitrust claim is within the exclusive jurisdiction of the federal courts does not necessarily make § 1738 inapplicable in this case. While a state court will have no occasion to address the question whether a state judgment has issue or claim preclusive effect in a later action that can be brought only in federal court, a federal court may nevertheless rely in the first instance on state preclusion principles to determine the extent to which an earlier state judgment bars subsequent litigation. Pp. 379–382.

(b) Reference to state preclusion law may make it unnecessary to determine if a federal court, as an exception to § 1738, should refuse to give preclusive effect to a state-court judgment. Here, unless application of Illinois preclusion law suggests that petitioners' federal antitrust claim is barred, there will be no need to decide if there is an exception to § 1738. This Court will not create a special exception to § 1738 for federal antitrust claims that would give state-court judgments greater preclusive effect than would the courts of the State rendering judgment, and that effectively holds as a matter of federal law that a plaintiff can bring state-law claims initially in state court only at the cost of forgoing subsequent federal antitrust claims. Pp. 383–386.

726 F. 2d 1150, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, POWELL, and REHNQUIST, JJ., joined. BURGER, C. J., filed an opinion concurring in the judgment, *post*, p. 387. BLACKMUN and STEVENS, JJ., took no part in the consideration or decision of the case.

Michael T. Sawyier argued the cause for petitioners. With him on the briefs were *Stephen B. Cohen*, *George C. Pontikes*, and *John J. Casey, Jr.*

Charles W. Murdock, Deputy Attorney General of Illinois, argued the cause for the State of Illinois et al. as *amici curiae* urging reversal. With him on the brief were *Neil F. Hartigan*, Attorney General of Illinois, and *Robert E. Davy*, *Thomas J. DeMay*, and *James N. O'Hara*, Assistant Attorneys General, *Linley E. Pearson*, Attorney General of Indiana, and *Frank A. Baldwin*, Deputy Attorney General, *Bronson C. La Follette*, Attorney General of Wisconsin, and *Michael L. Zaleski*, Assistant Attorney General.

D. Kendall Griffith argued the cause for respondent. With him on the brief were *Thomas M. Crisham*, *Robert E. Nord*, and *Pamela S. Hollis*.

JUSTICE O'CONNOR delivered the opinion of the Court.

This case concerns the preclusive effect of a state court judgment in a subsequent lawsuit involving federal antitrust claims within the exclusive jurisdiction of the federal courts. The Court of Appeals for the Seventh Circuit, sitting en banc, held as a matter of federal law that the earlier state court judgments barred the federal antitrust suit. 726 F. 2d 1150 (1984). Under 28 U. S. C. § 1738, a federal court generally is required to consider first the law of the State in which the judgment was rendered to determine its preclusive effect. Because the lower courts did not consider state preclusion law in this case, we reverse and remand.

I

Petitioners are board-certified orthopaedic surgeons who applied for membership in respondent American Academy of Orthopaedic Surgeons (Academy). Respondent denied the membership applications without providing a hearing or a statement of reasons. In November 1976, petitioner Dr. Treister filed suit in the Circuit Court of Cook County, State of Illinois, alleging that the denial of membership in the Academy violated associational rights protected by Illinois common law. Petitioner Dr. Marrese separately filed a similar action in state court. Neither petitioner alleged a violation of state antitrust law in his state court action; nor did either petitioner contemporaneously file a federal antitrust suit. The Illinois Appellate Court ultimately held that Dr. Treister's complaint failed to state a cause of action, *Treister* v. *American Academy of Orthopaedic Surgeons*, 78 Ill. App. 3d 746, 396 N. E. 2d 1225 (1979), and the Illinois Supreme Court denied leave to appeal. 79 Ill. 2d 630 (1980). After the Appellate Court ruled against Dr. Treister, the Circuit Court dismissed Dr. Marrese's complaint.

In March 1980, petitioners filed a federal antitrust suit in the United States District Court for the Northern District of Illinois based on the same events underlying their unsuccessful state court actions. As amended, the complaint alleged that respondent Academy possesses monopoly power, that petitioners were denied membership in order to discourage competition, and that their exclusion constituted a boycott in violation of § 1 of the Sherman Act, 15 U. S. C. § 1. App. 8, 26–30, 33. Respondent filed a motion to dismiss arguing that claim preclusion barred the federal antitrust claim because the earlier state court actions concerned the same facts and were dismissed with prejudice.[1] In denying this motion, the District Court reasoned that state courts lack jurisdiction over federal antitrust claims, and therefore a state court judgment cannot have claim preclusive effect in a subsequent federal antitrust suit. 496 F. Supp. 236, 238–239 (1980), on reconsideration, 524 F. Supp. 389 (1981). Discovery began and respondent refused to allow petitioners access to certain files relating to membership applications. After respondent persisted in this refusal despite a discovery order, the District Court held respondent in criminal contempt. App. to Pet. for Cert. N–1.

The judgment of contempt was reversed by a divided panel of the Court of Appeals in an opinion holding that the District Judge had abused his discretion by authorizing discovery of the membership files and also suggesting that the federal action was barred by claim preclusion and that the antitrust claims were groundless. 692 F. 2d 1083 (1982). This opinion was vacated by an en banc vote, and the original panel issued a narrower opinion that did not discuss claim preclusion. 706 F. 2d 1488 (1983). The Court of Appeals then vacated the second opinion and ordered rehearing en banc. In a divided vote, the Court of Appeals held that claim preclusion barred the federal antitrust suit and reversed the contempt order because the discovery order was invalid. 726 F. 2d 1150 (1984).

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[1] In this opinion we use the term "claim preclusion" to refer to "res judicata" in a narrow sense, *i. e.*, the preclusive effect of a judgment in foreclosing litigation of matters that should have been raised in an earlier suit. In contrast, we use the term "issue preclusion" to refer to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided. See *Migra* v. *Warren City School Dist. Bd. of Ed.*, 465 U. S. 75, 77, n. 1 (1984).

On the claim preclusion issue, no opinion commanded the votes of a majority of the Court of Appeals. A plurality opinion concluded that a state court judgment bars the subsequent filing of a federal antitrust claim if the plaintiff could have brought a state antitrust claim under a state statute "materially identical" to the Sherman Act. *Id.*, at 1153. The plurality examined the Illinois Antitrust Act, Ill. Rev. Stat., ch. 38, ¶60–3(2) (1981), and found that it is sufficiently similar to the Sherman Act to bar petitioners' federal antitrust claims in the instant case. *Id.*, at 1155–1156. An opinion concurring in part concluded that res judicata required petitioners to bring their "entire cause of action within a reasonable period of time." *Id.*, at 1166 (Flaum, J.). To avoid preclusion of their federal antitrust claim, petitioners should have either filed concurrent state and federal actions or brought their state claims in federal court pendent to their Sherman Act claim. *Ibid.*

Five judges also concluded that the discovery order was invalid and therefore the contempt judgment should be reversed. A plurality opinion first observed that the discovery order was invalid because the District Court should have dismissed the suit on claim preclusion grounds before the discovery order was entered. *Id.*, at 1158. Alternatively, the order constituted an abuse of discretion because it did not adequately prevent petitioners from misusing the discovery process. *Id.*, at 1158–1162. Three judges joined the entire discussion concerning the discovery order. A fourth judge did not believe that claim preclusion applied, but he agreed that the discovery order constituted an abuse of discretion. *Id.*, at 1162 (Eschbach, J., concurring in part and dissenting in part). Finally, the fifth judge observed that it was sufficient to hold that the complaint should have been dismissed on claim preclusion grounds; he added, however, that if he thought it necessary he would join the portion of the plurality opinion holding the discovery order invalid. *Id.*, at 1162 (Bauer, J., concurring).

We granted certiorari limited to the question whether the Court of Appeals correctly held that claim preclusion requires dismissal of the federal antitrust action, 467 U. S. 1258 (1984), and we now reverse.

II

Before addressing the merits of the decision below, we first examine whether the Court of Appeals had jurisdiction to review the District Court's denial of the motion to dismiss. Although the parties did not raise the jurisdictional issue before this Court, we address it to assure that the claim preclusion issue is properly before us. See, *e. g.*, *United States* v. *Storer Broadcasting Co.*, 351 U. S. 192, 197 (1956). In the present case, the District Court initially refused to certify its denial of the motion to dismiss for immediate appeal pursuant to 28 U. S. C. § 1292(b). The District Court subsequently held respondent in criminal contempt for refusing to comply with a discovery order. Respondent then appealed from the judgment of criminal contempt pursuant to 28 U. S. C. § 1291. See *Bray* v. *United States*, 423 U. S. 73 (1975) *(per curiam)*. While the appeal from the contempt judgment was pending, the District Court amended the earlier denial of the motion to dismiss in order to certify it for immediate appeal. App. to Pet. for Cert. I–1. The Court of Appeals authorized interlocutory appeal pursuant to § 1292(b), and ordered proceedings consolidated with the appeal from the contempt order. 726 F. 2d, at 1152; App. to Pet. for Cert. J–1.

Petitioners argued below that because the appeal from the contempt order was pending, the District Court lacked jurisdiction to amend its order denying the motion to dismiss to allow interlocutory appeal. In general, filing of a notice of appeal confers jurisdiction on the court of appeals and divests the district court of control over those aspects of the case involved in the appeal. *Griggs* v. *Provident Consumer Discount Co.*, 459 U. S. 56, 58 (1982) *(per curiam)*. This proposition, however, does not imply that an appeal from a judgment of criminal contempt based on noncompliance with a discovery order transfers jurisdiction over the entire case to the court of appeals. Criminal contempt judgments are immediately appealable pursuant to § 1291 because they result from "'a separate and independent proceeding . . . to vindicate the authority of the court'" and are "'not a part of the original cause.'" *Bray*, *supra*, at 75, quoting *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 445, 451 (1911).

Thus, prior to certification of the claim preclusion issue pursuant to § 1292(b), the contempt judgment was the only matter before the Court of Appeals. See 706 F. 2d, at 1497–1498; 692 F. 2d, at 1096. The District Court's amendment of its initial denial of the motion to dismiss did not interfere with but instead facilitated review of the pending appeal from the contempt order. We agree with the Court of Appeals, 726 F. 2d, at 1152, that the pendency of the appeal from the contempt judgment did not prevent the District Court from certifying the denial of the motion to dismiss for immediate appeal under § 1292(b). Accordingly, the Court of Appeals properly exercised jurisdiction over the consolidated appeals, and we have jurisdiction to review that court's decision with respect to dismissal of the antitrust claim.

III

The issue presented by this case is whether a state court judgment may have preclusive effect on a federal antitrust claim that could not have been raised in the state proceeding. Although federal antitrust claims are within the exclusive jurisdiction of the federal courts, see, *e. g.*, *General Investment*

Co. v. *Lake Shore & M. S. R. Co.*, 260 U. S. 261, 286–288 (1922), the Court of Appeals ruled that the dismissal of petitioners' complaints in state court barred them from bringing a claim based on the same facts under the Sherman Act. The Court of Appeals erred by suggesting that in these circumstances a federal court should determine the preclusive effect of a state court judgment without regard to the law of the State in which judgment was rendered.

The preclusive effect of a state court judgment in a subsequent federal lawsuit generally is determined by the full faith and credit statute, which provides that state judicial proceedings "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken." 28 U. S. C. § 1738. This statute directs a federal court to refer to the preclusion law of the State in which judgment was rendered. "It has long been established that § 1738 does not allow federal courts to employ their own rules of res judicata in determining the effect of state judgments. Rather, it goes beyond the common law and commands a federal court to accept the rules chosen by the State from which the judgment is taken." *Kremer* v. *Chemical Construction Corp.*, 456 U. S. 461, 481–482 (1982); see also *Allen* v. *McCurry*, 449 U. S. 90, 96 (1980). Section 1738 embodies concerns of comity and federalism that allow the States to determine, subject to the requirements of the statute and the Due Process Clause, the preclusive effect of judgments in their own courts. See *Kremer*, *supra*, at 478, 481–483. Cf. *Riley* v. *New York Trust Co.*, 315 U. S. 343, 349 (1942) (discussing preclusive effect of state judgment in proceedings in another State).

The fact that petitioners' antitrust claim is within the exclusive jurisdiction of the federal courts does not necessarily make § 1738 inapplicable to this case. Our decisions indicate that a state court judgment may in some circumstances have preclusive effect in a subsequent action within the exclusive jurisdiction of the federal courts. Without discussing § 1738, this Court has held that the issue preclusive effect of a state court judgment barred a subsequent patent suit that could not have been brought in state court. *Becher* v. *Contoure Laboratories, Inc.*, 279 U. S. 388 (1929). Moreover, *Kremer* held that § 1738 applies to a claim of employment discrimination under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.*, although the Court expressly declined to decide whether Title VII claims can be brought only in federal courts. 456 U. S., at 479, n. 20. *Kremer* implies that absent an exception to § 1738, state law determines at least the issue preclusive effect of a prior state judgment in a subsequent action involving a claim within the exclusive jurisdiction of the federal courts.

More generally, *Kremer* indicates that § 1738 requires a federal court to look first to state preclusion law in determining the preclusive effects of a state court judgment. Cf. *Haring* v. *Prosise*, 462 U. S. 306, 314, and n. 8 (1983); Smith, Full Faith and Credit and Section 1983: A Reappraisal, 63 N. C. L. Rev. 59, 110–111 (1984). The Court's analysis in *Kremer* began with the finding that state law would in fact bar relitigation of the discrimination issue decided in the earlier state proceedings. 456 U. S., at 466–467. That finding implied that the plaintiff could not relitigate the same issue in federal court unless some exception to § 1738 applied. *Ibid.* *Kremer* observed that "an exception to § 1738 will not be recognized unless a later statute contains an express or implied repeal." *Id.*, at 468; see also *Allen* v. *McCurry*, *supra*, at 99. Title VII does not expressly repeal § 1738, and the Court concluded that the statutory provisions and legislative history do not support a finding of implied repeal. 456 U. S., at 476. We conclude that the basic approach adopted in *Kremer* applies in a lawsuit involving a claim within the exclusive jurisdiction of the federal courts.

To be sure, a state court will not have occasion to address the specific question whether a state judgment has issue or claim preclusive effect in a later action that can be brought only in federal court. Nevertheless, a federal court may rely in the first instance on state preclusion principles to determine the extent to which an earlier state judgment bars subsequent litigation. Cf. *FDIC* v. *Eckhardt*, 691 F. 2d 245, 247–248 (CA6 1982) (applying state law to determine preclusive effect on claim within concurrent jurisdiction of state and federal courts). *Kremer* illustrates that a federal court can apply state rules of issue preclusion to determine if a matter actually litigated in state court may be relitigated in a subsequent federal proceeding. See 456 U. S., at 467.

With respect to matters that were not decided in the state proceedings, we note that claim preclusion generally does not apply where "[t]he plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy because of the limitations on the subject matter jurisdiction of the courts . . . ." Restatement (Second) of Judgments § 26(1)(c) (1982). If state preclusion law includes this requirement of prior jurisdictional competency, which is generally true, a state judgment will *not* have claim preclusive effect on a cause of action within the exclusive jurisdiction of the federal courts. Even in the event that a party asserting the affirmative defense of claim preclusion can show that state preclusion rules in some circumstances bar a claim outside the jurisdiction of the court that rendered the initial judgment, the federal court should first consider whether application of the state rules would bar the particular federal claim.[2]

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[2] Our analysis does not necessarily suggest that the Court of Appeals for the Fourth Circuit erred in its holding in *Nash County Board of Education* v. *Biltmore Co.*, 640 F. 2d 484, cert. denied, 454 U. S. 878 (1981). The Court of Appeals there applied federal preclusion principles to conclude that a state judgment approving settlement of state antitrust claims barred a subsequent federal antitrust claim. Although our decision today indicates that the Court of Appeals should have looked in the first instance to state law to determine the preclusive effect of the state judgment, the same holding would result if application of state preclusion law suggests

Reference to state preclusion law may make it unnecessary to determine if the federal court, as an exception to § 1738, should refuse to give preclusive effect to a state court judgment. The issue whether there is an exception to § 1738 arises only if state law indicates that litigation of a particular claim or issue should be barred in the subsequent federal proceeding. To the extent that state preclusion law indicates that a judgment normally does not have claim preclusive effect as to matters that the court lacked jurisdiction to entertain, lower courts and commentators have correctly concluded that a state court judgment does not bar a subsequent federal antitrust claim. See 726 F. 2d, at 1174 (Cudahy, J., dissenting) (citing cases); 692 F. 2d, at 1099 (Stewart, J., dissenting); Restatement, *supra*, § 25(1), Comment *e; id.*, § 26(1)(c), Illustration 2; 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4470, pp. 687–688 (1981). Unless application of Illinois preclusion law suggests, contrary to the usual view, that petitioners' federal antitrust claim is somehow barred, there will be no need to decide in this case if there is an exception to § 1738.[3]

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that the settlement bars the subsequent federal claim and if there is no exception to § 1738 in these circumstances. Cf. 640 F. 2d, at 487, n. 5 (noting that state law gives preclusive effect to consent judgment). We, of course, do not address those issues here.

[3] THE CHIEF JUSTICE notes that preclusion rules bar the splitting of a cause of action between a court of limited jurisdiction and one of general jurisdiction, and suggests that state requirements of jurisdictional competency may leave unclear whether a state court action precludes a subsequent federal antitrust claim. *Post*, at 388–390. The rule that the judgment of a court of limited jurisdiction concludes the entire claim assumes that the plaintiff might have commenced his action in a court *in the same system of courts* that was competent to give full relief. See Restatement (Second) of Judgments § 24, Comment *g* (1982). Moreover, the jurisdictional competency requirement generally is understood to imply that state court litigation based on a state statute analogous to a federal statute, *e. g.*, a state antitrust law, does not bar subsequent attempts to secure

The Court of Appeals did not apply the approach to § 1738 that we have outlined. Both the plurality opinion, see 726 F. 2d, at 1154, and an opinion concurring in part, see *id.*, at 1163–1164 (Flaum, J.), express the view that § 1738 allows a federal court to give a state court judgment greater preclusive effect than the state courts themselves would give to it. This proposition, however, was rejected by *Migra* v. *Warren City School Dist. Bd. of Ed.*, 465 U. S. 75 (1984), a case decided shortly after the Court of Appeals announced its decision in the instant case. In *Migra*, a discharged schoolteacher filed suit under 42 U. S. C. § 1983 in federal court after she prevailed in state court on a contract claim involving the same underlying events. The Federal District Court dismissed the § 1983 action as barred by claim preclusion. The opinion of this Court emphasized that under § 1738, state law determined the preclusive effect of the state judgment. *Id.*, at 81. Because it was unclear from the record whether the District Court's ruling was based on state preclusion law, we remanded for clarification on this point. *Id.*, at 87. Such a remand obviously would have been unnecessary were a federal court free to give greater preclusive effect to a state court judgment than would the judgment-rendering State. See *id.*, at 88 (WHITE, J., concurring).

We are unwilling to create a special exception to § 1738 for federal antitrust claims that would give state court judgments greater preclusive effect than would the courts of the State rendering the judgment. Cf. *Haring* v. *Prosise*, 462 U. S., at 317–318 (refusing to create special preclusion rule for § 1983 claim subsequent to plaintiff's guilty plea). The plurality opinion for the Court of Appeals relied on *Federated*

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relief in federal court if the state court lacked jurisdiction over the federal statutory claim. *Id.*, § 26(1)(c), Illustration 2. Although a particular State's preclusion principles conceivably could support a rule similar to that proposed by THE CHIEF JUSTICE, *post*, at 390–391, where state preclusion rules do not indicate that a claim is barred, we do not believe that federal courts should fashion a federal rule to preclude a claim that could not have been raised in the state proceedings.

Department Stores, Inc. v. *Moitie,* 452 U. S. 394 (1981), to observe that the doctrine of claim preclusion protects defendants from repetitive lawsuits based on the same conduct, 726 F. 2d, at 1152, and that there is a practical need to require plaintiffs "to litigate their claims in an economical and parsimonious fashion." *Id.*, at 1153. We agree that these are valid and important concerns, and we note that under § 1738 state issue preclusion law may promote the goals of repose and conservation of judicial resources by preventing the relitigation of certain issues in a subsequent federal proceeding. See *Kremer*, 456 U. S., at 485 (state judgment barred subsequent Title VII action in federal court).

If we had a single system of courts and our only concerns were efficiency and finality, it might be desirable to fashion claim preclusion rules that would require a plaintiff to bring suit initially in the forum of most general jurisdiction, thereby resolving as many issues as possible in one proceeding. See Restatement (Second) of Judgments § 24, Comment *g* (1982); C. Wright, A. Miller, & E. Cooper, *supra,* § 4407, p. 51; *id.* § 4412, p. 93. The decision of the Court of Appeals approximates such a rule inasmuch as it encourages plaintiffs to file suit initially in federal district court and to attempt to bring any state law claims pendent to their federal antitrust claims. Whether this result would reduce the overall burden of litigation is debatable, see 726 F. 2d, at 1181–1182 (Cudahy, J., dissenting); C. Wright, A. Miller, & E. Cooper, *supra,* § 4407, p. 51–52, and we decline to base our interpretation of § 1738 on our opinion on this question.

More importantly, we have parallel systems of state and federal courts, and the concerns of comity reflected in § 1738 generally allow States to determine the preclusive scope of their own courts' judgments. See *Kremer, supra,* at 481–482; *Allen* v. *McCurry,* 449 U. S., at 96; cf. Currie, Res Judicata: The Neglected Defense, 45 U. Chi. L. Rev. 317, 327 (1978) (state policies may seek to limit preclusive effect of state court judgment). These concerns certainly are not made less compelling because state courts lack jurisdiction over federal antitrust claims. We therefore reject a judicially created exception to § 1738 that effectively holds as a matter of federal law that a plaintiff can bring state law claims initially in state court only at the cost of forgoing subsequent federal antitrust claims. *Federated Department Stores, Inc.* v. *Moitie* does not suggest a contrary conclusion. That case did not involve § 1738; rather it held that "accepted principles of res judicata" determine the preclusive effect of a federal court judgment. See 452 U. S., at 401.

In this case the Court of Appeals should have first referred to Illinois law to determine the preclusive effect of the state judgment. Only if state law indicates that a particular claim or issue would be barred, is it necessary to determine if an exception to § 1738 should apply. Although for purposes of this case, we need not decide if such an exception exists for federal antitrust claims, we observe that the more general question is whether the concerns underlying a particular grant of exclusive jurisdiction justify a finding of an implied partial repeal of § 1738. Resolution of this question will depend on the particular federal statute as well as the nature of the claim or issue involved in the subsequent federal action. Our previous decisions indicate that the primary consideration must be the intent of Congress. See *Kremer*, *supra*, at 470–476 (finding no congressional intent to depart from § 1738 for purposes of Title VII); cf. *Brown* v. *Felsen*, 442 U. S. 127, 138 (1979) (finding congressional intent that state judgments would not have claim preclusive effect on dischargeability issue in bankruptcy).

IV

The decisions below did not consider Illinois preclusion law in their discussion of the claim preclusion issue. The District Court relied on federal law to conclude that the state judgments did not bar the claims under the Sherman Act. See 496 F. Supp., at 238–239. Similarly, the plurality opinion of the Court of Appeals did not discuss Illinois principles of claim preclusion. See 726 F. 2d, at 1154. Although an opinion concurring in part also concluded that petitioners' antitrust claim was barred as a matter of federal law, it did suggest that this conclusion was consistent with Illinois law. See *id.*, at 1164 (Flaum, J.). A dissenting opinion vigorously argued that principles of Illinois claim preclusion law did not require dismissal of the federal antitrust claims. See *id.*, at 1176–1177 (Cudahy, J.). Before this Court, the parties have continued to disagree about the content of Illinois preclusion law. We believe that this dispute is best resolved in the first instance by the District Court. Cf. *Migra* v. *Warren City School Dist. Bd. of Ed.*, 465 U. S., at 87.

Petitioners also urge us to reverse the decision of the Court of Appeals with respect to the contempt order. We specifically declined to grant certiorari on questions related to the discovery order or the subsequent contempt order, and we do not address those issues here.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE BLACKMUN and JUSTICE STEVENS took no part in the consideration or decision of this case.

CHIEF JUSTICE BURGER, concurring in the judgment.

I agree with the Court's implicit conclusion that the Court of Appeals approached 28 U. S. C. § 1738 too narrowly and technically by holding it irrelevant on the ground that Illinois law does not address the preclusive effect of a state court judgment on a federal antitrust suit, see 726 F. 2d 1150, 1154 (1984). In the circumstances presented by this case, a fair reading of § 1738 requires federal courts to look first to general principles of state preclusion law. Those principles control if they clearly establish that the state court judgment does not bar the later federal action: Only recently, we reaffirmed in *Migra* v. *Warren City School District Board of Education*, 465 U. S. 75 (1984), that a federal court is not free to accord greater preclusive effect to a state court judgment than the state courts themselves would give to it.

The Court now remands with directions for the District Court to consider Illinois claim preclusion law, but no guidance is given as to how the District Court should proceed if it finds state law silent or indeterminate on the claim preclusion question. The Court's refusal to acknowledge this potential problem appears to stem from a belief that the jurisdictional competency requirement of res judicata doctrine will dispose of most cases like this. See *ante*, at 382.

I cannot agree with the Court's interpretation of the jurisdictional competency requirement. If state law provides a cause of action that is virtually identical with a federal statutory cause of action, a plaintiff suing in state court is able to rely on the same theory of the case and obtain the same remedy as would be available in federal court, even when the plaintiff cannot expressly invoke the federal statute because it is within the exclusive jurisdiction of the federal courts. In this situation, the jurisdictional competency requirement is effectively satisfied. Therefore, the fact that state law recognizes the jurisdictional competency requirement does not necessarily imply that a state court judgment has no claim preclusive effect on a cause of action within exclusive federal jurisdiction.

The states that recognize the jurisdictional competency requirement do not all define it in the same terms. Illinois courts have expressed the doctrine in the following manner: "The principle [of res judicata] extends not only to questions which were actually litigated but also to all *questions* which *could have been raised* or determined." *Spiller* v. *Continental Tube Co.*, 95 Ill. 2d 423, 432, 447 N. E. 2d 834, 838 (1983) (emphasis added); see also, *e. g.*, *LaSalle National Bank* v. *County Board of School Trustees*, 61 Ill. 2d 524, 529, 337 N. E. 2d 19, 22 (1975); *People* v. *Kidd*, 398 Ill. 405, 408, 75 N. E. 2d 851, 853–854 (1947). In the present case, each petitioner could have alleged a cause of action under the Illinois Antitrust Act, Ill. Rev. Stat., ch. 38, ¶60–1 *et seq.* (1981), in his prior state court lawsuit against respondent. The principles of Illinois res judicata doctrine appear to be indeterminate as to whether petitioners' ability to raise state antitrust claims in their prior state court suits should preclude their assertion of essentially the same claims in the present federal action. This indeterminacy arises from the fact that the Illinois courts have not addressed whether the notion of "questions which could have been raised" should be applied narrowly[1] or broadly.[2] No Illinois court has considered how the jurisdictional competency requirement should apply in the type of situation presented by this case, where the same theory of recovery may be asserted under different statutes. Nor has any Illinois court considered whether res judicata precludes splitting a cause of action between a court of limited jurisdiction and one of general jurisdiction.[3]

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[1] *E. g.*, by inquiring whether the plaintiff could have raised the question whether the defendant violated a particular statute.

[2] *E. g.*, by inquiring whether the plaintiff could have raised the question whether the defendant engaged in a group boycott.

[3] Compare Restatement (Second) of Judgments § 24, Comment *g*, Illustration 14, pp. 204–205 (1982):

"In an automobile collision, A is injured and his car damaged as a result of the negligence of B. Instead of suing in a court of general jurisdiction of the state, A brings his action for the damage to his car in a justice's court, which has jurisdiction in actions for damage to property but has no jurisdiction in actions for injury to the person. Judgment is rendered for A for the damage to the car. A cannot thereafter maintain an action against B to recover for the injury to his person arising out of the same collision."

See also 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4412, p. 95 (1981), stating that the "general rule" in state courts is that "[a] second action will not be permitted on parts of a single claim that could have been asserted in a court of broader jurisdiction simply because the plaintiff went first to a court of limited jurisdiction in the same state that could not hear them." The holding in *Lucas* v. *Le Compte*, 42 Ill. 303 (1866), is similar to this "general rule," but that holding was based on a construction of an Illinois statute, Ill. Rev. Stat., ch. 59, § 35 (1845), which (a) has been repealed, see Act of Apr. 15, 1965, 1965 Ill. Laws 331, and (b)

Hence it is likely that the principles of Illinois claim preclusion law do not speak to the preclusive effect that petitioners' state court judgments should have on the present action. In this situation, it may be consistent with § 1738 for a federal court to formulate a federal rule to resolve the matter. If state law is simply indeterminate, the concerns of comity and federalism underlying § 1738 do not come into play. At the same time, the federal courts have direct interests in ensuring that their resources are used efficiently and not as a means of harassing defendants with repetitive lawsuits, as well as in ensuring that parties asserting federal rights have an adequate opportunity to litigate those rights. Given the insubstantiality of the state interests and the weight of the federal interests, a strong argument could be made that a federal rule would be more appropriate than a creative interpretation of ambiguous state law.[4] When state law is indeterminate or ambiguous, a clear federal rule would promote substantive interests as well: "Uncertainty intrinsically works to defeat the opportunities for repose and reliance sought by the rules of preclusion, and confounds the desire for efficiency by inviting repetitious litigation to test the preclusive effects of the first effort." 18 C. Wright, A. Miller, & E. Cooper, *supra* n. 3, § 4407, at 49.

A federal rule might be fashioned from the test, which this Court has applied in other contexts, that a party is precluded

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had a broader preclusive effect than general Illinois res judicata doctrine has. *Clancey* v. *McBride*, 338 Ill. 35, 169 N. E. 729 (1929), involved the same circumstances as the above-quoted illustration from the Restatement. The court resolved the case, however, without reference to the limited jurisdiction of the justice's court, by concluding that injury to the person and injury to property are distinct legal wrongs that can be the subject of separate lawsuits.

[4] By contrast, when a federal court construes substantive rights and obligations under state law in the context of a diversity action, the federal interest is insignificant and the state's interest is much more direct than it is in the present situation, even if the relevant state law is ambiguous.

from asserting a claim that he had a "full and fair opportunity" to litigate in a prior action. See, *e. g.*, *Kremer* v. *Chemical Construction Corp.*, 456 U. S. 461, 485 (1982); *Allen* v. *McCurry*, 449 U. S. 90, 95 (1980); *Montana* v. *United States*, 440 U. S. 147, 153 (1979); *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U. S. 313, 328 (1971). Thus, if a state statute is identical in all material respects with a federal statute within exclusive federal jurisdiction, a party's ability to assert a claim under the state statute in a prior state court action might be said to have provided, in effect, a "full and fair opportunity" to litigate his rights under the federal statute. Cf. *Derish* v. *San Mateo-Burlingame Board of Realtors*, 724 F. 2d 1347 (CA9 1983); *Nash County Board of Education* v. *Biltmore Co.*, 640 F. 2d 484 (CA4), cert. denied, 454 U. S. 878 (1981).

The Court will eventually have to face these questions; I would resolve them now.

AIR FRANCE *v.* SAKS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 83-1785. Argued January 15, 1985—Decided March 4, 1985

Article 17 of the Warsaw Convention makes air carriers liable for injuries sustained by a passenger "if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking." Respondent, while a passenger on petitioner's jetliner as it descended to land in Los Angeles on a trip from Paris, felt severe pressure and pain in her left ear, and the pain continued after the jetliner landed. Shortly thereafter, respondent consulted a doctor who concluded that she had become permanently deaf in her left ear. She then filed suit in a California state court, alleging that her hearing loss was caused by negligent maintenance and operation of the jetliner's pressurization system. After the case was removed to Federal District Court, petitioner moved for summary judgment on the ground that respondent could not prove that her injury was caused by an "accident" within the meaning of Article 17, the evidence indicating that the pressurization system had operated in a normal manner. Relying on precedent that defines the term "accident" in Article 17 as an "unusual or unexpected" happening, the District Court granted summary judgment to petitioner. The Court of Appeals reversed, holding that the language, history, and policy of the Warsaw Convention and the Montreal Agreement (a private agreement among airlines that has been approved by the Federal Government) impose absolute liability on airlines for injuries proximately caused by the risks inherent in air travel; and that normal cabin pressure changes qualify as an "accident" within the definition contained in Annex 13 to the Convention on International Civil Aviation as meaning "an occurrence associated with the operation of an aircraft."

Held: Liability under Article 17 arises only if a passenger's injury is caused by an unexpected or unusual event or happening that is external to the passenger, and not where the injury results from the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft, in which case it has not been caused by an accident under Article 17. Pp. 396-408.

(a) The text of the Warsaw Convention suggests that the passenger's injury must be so caused. The difference in the language of Article 17 imposing liability for injuries to passengers caused by an "accident" and

Article 18 imposing liability for destruction or loss of baggage by an "occurrence," implies that the drafters of the Convention understood the word "accident" to mean something different than the word "occurrence." Moreover, Article 17 refers to an accident *which caused* the passenger's injury, and not to an accident which *is* the passenger's injury. The text thus implies that, however "accident" is defined, it is the *cause* of the injury that must satisfy the definition rather than the occurrence of the injury alone. And, since the Warsaw Convention was drafted in French by continental jurists, further guidance is furnished by the French legal meaning of "accident"—when used to describe a *cause* of injury, rather than the *event* of injury—as being a fortuitous, unexpected, unusual, or unintended event. Pp. 397–400.

(b) The above interpretation of Article 17 is consistent with the negotiating history of the Warsaw Convention, the conduct of the parties thereto, and the weight of precedent in foreign and American courts. Pp. 400–405.

(c) While any standard requiring courts to distinguish causes that are "accidents" from causes that are "occurrences" requires drawing a line that may be subject to differences as to where it should fall, an injured passenger is only required to prove that some link in the chain of causes was an unusual or unexpected event external to the passenger. Enforcement of Article 17's "accident" requirement cannot be circumvented by reference to the Montreal Agreement. That Agreement while requiring airlines to waive "due care" defenses under Article 20(1) of the Warsaw Convention, did not waive Article 17's "accident" requirement. Nor can enforcement of Article 17 be escaped by reference to the equation of "accident" with "occurrence" in Annex 13, which, with its corresponding Convention, expressly applies to aircraft accident *investigations* and not to principles of liability to passengers under the Warsaw Convention. Pp. 405–408.

724 F. 2d 1383, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which all other Members joined, except POWELL, J., who took no part in the consideration or decision of the case.

Stephen C. Johnson argued the cause for petitioner. With him on the briefs was *Lawrence N. Minch*.

Carroll E. Dubuc argued the cause for the Republic of France as *amicus curiae* urging reversal. With him on the brief was *Peter Hoenig*.

Bennett M. Cohen argued the cause for respondent. With him on the brief were *Daniel U. Smith* and *Albert R. Abramson.**

JUSTICE O'CONNOR delivered the opinion of the Court.

Article 17 of the Warsaw Convention[1] makes air carriers liable for injuries sustained by a passenger "if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking." We granted certiorari, 469 U. S. 815 (1984), to resolve a conflict among the Courts of Appeals as to the proper definition of the word "accident" as used in this international air carriage treaty.

I

On November 16, 1980, respondent Valerie Saks boarded an Air France jetliner in Paris for a 12-hour flight to Los Angeles. The flight went smoothly in all respects until, as the aircraft descended to Los Angeles, Saks felt severe pressure and pain in her left ear. The pain continued after the plane landed, but Saks disembarked without informing any Air France crew member or employee of her ailment. Five days later, Saks consulted a doctor who concluded that she had become permanently deaf in her left ear.

Saks filed suit against Air France in California state court, alleging that her hearing loss was caused by negligent maintenance and operation of the jetliner's pressurization system. App. 2. The case was removed to the United States District Court for the Central District of California. After extensive discovery, Air France moved for summary judgment on the ground that respondent could not prove that her injury was caused by an "accident" within the meaning of the Warsaw Convention. The term "accident," according to Air France, means an "abnormal, unusual or unexpected occurrence aboard the aircraft." *Id.*, at 9. All the available evidence, including the postflight reports, pilot's affidavit, and passenger testimony, indicated that the aircraft's pressurization system had operated in the usual manner. Accordingly, the airline contended that the suit should be dismissed because the only alleged cause of respondent's injury—normal operation of a pressurization system—could not qualify as an "accident." In her opposition to the summary judgment motion, Saks acknowledged that "[t]he sole question of law presented . . . by the parties is whether a loss of hearing proximately caused by normal operation of the aircraft's pressurization system is an 'accident' within the meaning of Article 17 of the Warsaw Convention . . . ." *Id.*, at 30. She argued that "accident" should be defined as a "hazard of air travel," and that her injury had indeed been caused by such a hazard.

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*Briefs of *amici curiae* urging reversal were filed for the United States by *Solicitor General Lee, Acting Assistant Attorney General Willard, Deputy Solicitor General Geller, Alan I. Horowitz,* and *Mark H. Gallant;* and for the International Air Transport Association by *Randal R. Craft, Jr.*

[1] Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T. S. No. 876 (1934), note following 49 U. S. C. App. § 1502.

Relying on precedent which defines the term "accident" in Article 17 as an "unusual or unexpected" happening, see *DeMarines* v. *KLM Royal Dutch Airlines*, 580 F. 2d 1193, 1196 (CA3 1978), the District Court granted summary judgment to Air France. See also *Warshaw* v. *Trans World Airlines, Inc.*, 442 F. Supp. 400, 412–413 (ED Pa. 1977) (normal cabin pressure changes are not "accidents" within the meaning of Article 17). A divided panel of the Court of Appeals for the Ninth Circuit reversed. 724 F. 2d 1383 (1984). The appellate court reviewed the history of the Warsaw Convention and its modification by the 1966 Montreal Agreement, a private agreement among airlines that has been approved by the United States Government. Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, Agreement CAB 18900, 31 Fed. Reg. 7302 (1966), note following 49 U. S. C. App. § 1502. The court concluded that the language, history, and policy of the Warsaw Convention and the Montreal Agreement impose absolute liability on airlines for injuries proximately caused by the risks inherent in air travel. The court found a definition of "accident" consistent with this history and policy in Annex 13 to the Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, T. I. A. S. No. 1591, 15 U. N. T. S. 295; conformed to in 49 CFR § 830.2 (1984): "an occurrence associated with the operation of an aircraft which takes place between the time any person boards the aircraft with the intention of flight and all such persons have disembarked . . . ." 724 F. 2d, at 1385. Normal cabin pressure changes qualify as an "accident" under this definition. A dissent agreed with the District Court that "accident" should be defined as an unusual or unexpected occurrence. *Id.*, at 1388 (Wallace, J.). We disagree with the definition of "accident" adopted by the Court of Appeals, and we reverse.

II

Air France is liable to a passenger under the terms of the Warsaw Convention only if the passenger proves that an "accident" was the cause of her injury. *MacDonald* v. *Air Canada*, 439 F. 2d 1402 (CA1 1971); *Mathias* v. *Pan Am World Airways, Inc.*, 53 F. R. D. 447 (WD Pa. 1971). See 1 C. Shawcross & K. Beaumont, Air Law ¶ VII(147) (4th ed. 1984); D. Goedhuis, National Airlegislations and the Warsaw Convention 199 (1937). The narrow issue presented is whether respondent can meet this burden by showing that her injury was caused by the normal operation of the aircraft's pressurization system. The proper answer turns on interpretation of a clause in an international treaty to which the United States is a party. "[T]reaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Choctaw Nation of Indians* v. *United States*, 318 U. S. 423, 431–432 (1943). The analysis must begin, however, with the text of the treaty and the context in which the written words are used. See *Maximov* v. *United States*, 373 U. S. 49, 53–54 (1963).

A

Article 17 of the Warsaw Convention establishes the liability of international air carriers for harm to passengers. Article 18 contains parallel provisions regarding liability for damage to baggage. The governing text of the Convention is in the French language, and we accordingly set forth the French text of the relevant part of Articles 17 and 18 in the margin.[2] The official American translation of this portion of the text, which was before the Senate when it ratified the Convention in 1934, reads as follows:

> "Article 17
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> "The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, *if the accident which caused the damage* so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.
>
> "Article 18
>
> "(1) The carrier shall be liable for damage sustained in the event of the destruction or loss of, or of damage to, any checked baggage or any goods, *if the occurrence*

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[2] "Article 17

"Le transporteur est responsable du dommage survenu en cas de mort, de blessure ou de toute autre lésion corporelle subie par un voyageur *lorsque l'accident qui a causé le dommage* s'est produit à bord de l'aéronef ou au cours de toutes opérations d'embarquement et de débarquement.

"Article 18

"(1) Le transporteur est responsable du dommage survenu en cas destruction, perte ou avarie de bagages enregistrés ou de marchandises *lorsque l'événement qui a causé le dommage* s'est produit pendant le transport aérien." 49 Stat. 3005 (emphasis added).

Article 36 of the Convention recites that it is drawn in French. *Id.*, at 3008.

> *which caused the damage* so sustained took place during the transportation by air." 49 Stat. 3018–3019.

Two significant features of these provisions stand out in both the French and the English texts. First, Article 17 imposes liability for injuries to passengers caused by an "accident," whereas Article 18 imposes liability for destruction or loss of baggage caused by an "occurrence." This difference in the parallel language of Articles 17 and 18 implies that the drafters of the Convention understood the word "accident" to mean something different than the word "occurrence," for they otherwise logically would have used the same word in each article. See Goedhuis, *supra*, at 200–201; M. Milde, The Problems of Liabilities in International Carriage by Air 62 (Caroline Univ. 1963). The language of the Convention accordingly renders suspect the opinion of the Court of Appeals that "accident" means "occurrence."

Second, the text of Article 17 refers to an accident *which caused* the passenger's injury, and not to an accident which *is* the passenger's injury. In light of the many senses in which the word "accident" can be used, this distinction is significant. As Lord Lindley observed in 1903:

> "The word 'accident' is not a technical legal term with a clearly defined meaning. Speaking generally, but with reference to legal liabilities, an accident means any unintended and unexpected occurrence which produces hurt or loss. But it is often used to denote any unintended and unexpected loss or hurt apart from its cause; and if the cause is not known the loss or hurt itself would certainly be called an accident. The word 'accident' is also often used to denote both the cause and the effect, no attempt being made to discriminate between them." *Fenton* v. *J. Thorley & Co.*, [1903] A. C. 443, 453.

In Article 17, the drafters of the Warsaw Convention apparently did make an attempt to discriminate between "the cause and the effect"; they specified that air carriers would be liable if an accident *caused* the passenger's injury. The text of the Convention thus implies that, however we define "accident," it is the *cause* of the injury that must satisfy the definition rather than the occurrence of the injury alone. American jurisprudence has long recognized this distinction between an accident that is the *cause* of an injury and an injury that is itself an accident. See *Landress* v. *Phoenix Mutual Life Ins. Co.*, 291 U. S. 491 (1934).

While the text of the Convention gives these two clues to the meaning of "accident," it does not define the term. Nor is the context in which the term is used illuminating. See Note, Warsaw Convention—Air Carrier Liability for Passenger Injuries Sustained Within a Terminal, 45 Ford. L. Rev. 369, 388 (1976) ("The language of Article 17 is stark and undefined"). To determine the meaning of the term "accident" in Article 17 we must consider its French legal meaning. See *Reed* v. *Wiser*, 555 F. 2d 1079 (CA2), cert. denied, 434 U. S. 922 (1977); *Block* v. *Compagnie Nationale Air France*, 386 F. 2d 323 (CA5 1967), cert. denied, 392 U. S. 905 (1968). This is true not because "we are forever chained to French law" by the Convention, see *Rosman* v. *Trans World Airlines, Inc.*, 34 N. Y. 2d 385, 394, 314 N. E. 2d 848, 853 (1974), but because it is our responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties. *Reed*, *supra*, at 1090; *Day* v. *Trans World Airlines, Inc.*, 528 F. 2d 31 (CA2 1975), cert. denied, 429 U. S. 890 (1976). We look to the French legal meaning for guidance as to these expectations because the Warsaw Convention was drafted in French by continental jurists. See Lowenfeld & Mendelsohn, The United States and the Warsaw Convention, 80 Harv. L. Rev. 497, 498–500 (1967).

A survey of French cases and dictionaries indicates that the French legal meaning of the term "accident" differs little from the meaning of the term in Great Britain, Germany, or the United States. Thus, while the word "accident" is often used to refer to the *event* of a person's injury,[3] it is also sometimes used to describe a *cause* of injury, and when the word is used in this latter sense, it is usually defined as a fortuitous, unexpected, unusual, or unintended event. See 1 Grand Larousse de La Langue Française 29 (1971) (defining "accident" as "Evénement fortuit et fâcheux, causant des dommages corporels ou matériels"); *Air France* v. *Haddad, Judgment of June 19, 1979*, Cour d'appel de Paris, Première Chambre Civile, 1979 Revue Française de Droit Aérien 327, 328, appeal rejected, *Judgment of February 16, 1982*, Cour de Cassation, 1982 Bull. Civ. I 63. This parallels British and American jurisprudence. See *Fenton* v. *J. Thorley & Co., supra; Landress* v. *Phoenix Mutual Life Ins. Co., supra; Koehring Co.* v. *American Automobile Ins. Co.*, 353 F. 2d 993 (CA7 1965). The text of the Convention consequently suggests that the passenger's injury must be caused by an unexpected or unusual event.

B

This interpretation of Article 17 is consistent with the negotiating history of the Convention, the conduct of the parties to the Convention, and the weight of precedent in foreign and American courts. In interpreting a treaty it is proper, of course, to refer to the records of its drafting and negotiation. *Choctaw Nation of Indians* v. *United States*, 318 U. S., at 431. In part because the "travaux preparatoires" of the Warsaw Convention are published and generally available to litigants, courts frequently refer to these materials to resolve ambiguities in the text. See *Trans World Airlines, Inc.* v. *Franklin Mint Corp.*, 466 U. S. 243, 259 (1984); *Maugnie* v. *Companie Nationale Air France*, 549 F. 2d 1256 (CA9 1977); *Fothergill* v. *Monarch Airlines, Ltd.*, [1980] 2 All E. R. 696 (H. L.).

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[3] See, *e. g.*, M. LeGrand, Dictionnaire Usuel de Droit 8 (1931) (defining "accident" as "Événement fortuit et malheureux qui ouvre à la victime, soit par suite de l'imprévoyance ou de la négligence d'une personne, soit en vertu du 'risque professionel,' droit à une réparation pécuniaire").

The treaty that became the Warsaw Convention was first drafted at an international conference in Paris in 1925. The protocol resulting from the Paris Conference contained an article specifying: "The carrier is liable for accidents, losses, breakdowns, and delays. It is not liable if it can prove that it has taken reasonable measures designed to pre-empt damage . . . ."[4] The protocol drafted at Paris was revised several times by a committee of experts on air law,[5] and then submitted to a second international conference that convened in Warsaw in 1929. The draft submitted to the conference stated:

> "The carrier shall be liable for damage sustained during carriage:
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> "(a) in the case of death, wounding, or any other bodily injury suffered by a traveler;
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> "(b) in the case of destruction, loss, or damage to goods or baggage;
>
> "(c) in the case of delay suffered by a traveler, goods, or baggage." International Conference on Air Law Affecting Air Questions, Minutes, Second International Conference on Private Aeronautical Law, October 4–12, 1929, Warsaw 264–265 (R. Horner & D. Legrez trans. 1975).

Article 22 of this draft, like the original Paris draft, permitted the carrier to avoid liability by proving it had taken reasonable measures to avoid the damage. *Id.*, at 265. None of the early drafts required that an accident *cause* the passenger's injury.

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[4] "Le transporteur est responsable des accidents, pertes, avaries et retards. Il n'est pas responsable s'il prouve avoir pris les mesures raisonnables pour éviter le dommage . . . ." [1925 Paris] Conférence Internationale de Droit Privé Aérien 87 (1936).

[5] See Report of the Second Session, International Technical Committee of Legal Experts on Air Questions (1927); Report of the Third Session, International Technical Committee of Legal Experts on Air Questions (1928).

At Warsaw, delegates from several nations objected to the application of identical liability rules to both passenger injuries and damage to baggage, and the German delegation proposed separate liability rules for passengers and baggage. *Id.*, at 36. The need for separate rules arose primarily because delegates thought that liability for baggage should commence upon delivery to the carrier, whereas liability for passengers should commence when the passengers later embark upon the aircraft. *Id.*, at 72–74 (statements of French, Swiss, and Italian delegates). The Reporter on the Preliminary Draft of the Convention argued it would be too difficult to draft language specifying this distinction, and that such a distinction would be unnecessary because "Article 22 establishes a very mitigated system of liability for the carrier, and from the moment that the carrier has taken the reasonable measures, he does not answer for the risks, nor for the accidents occur[r]ing to people by the fault of third parties, nor for accidents occur[r]ing for any other cause." *Id.*, at 77–78 (statement of Reporter De Vos). The delegates were unpersuaded, and a majority voted to have a drafting committee rework the liability provisions for passengers and baggage. *Id.*, at 83.

A few days later, the drafting committee proposed the liability provisions that became Articles 17 and 18 of the Convention. Article 20(1) of the final draft contains the "necessary measures" language which the Reporter believed would shield the carrier from liability for "the accidents occur[r]ing to people by the fault of third parties" and for "accidents occur[r]ing for any other cause." Nevertheless, the redrafted Article 17 also required as a prerequisite to liability that an accident *cause* the passenger's injury, whereas the redrafted Article 18 required only that an occurrence cause the damage to baggage. Although Article 17 and Article 18 as redrafted were approved with little discussion, the President of the drafting committee observed that "given that there are *entirely different* liability cases: death or wounding, disappearance of goods, delay, we have deemed that it would be better to begin by setting out *the causes* of liability for persons, then for goods and baggage, and finally liability in the case of delay." *Id.*, at 205 (statement of Delegate Giannini) (emphasis added). This comment at least implies that the addition of language of causation to Articles 17 and 18 had a broader purpose than specification of the time at which liability commenced. It further suggests that the causes of liability for persons were intended to be different from the causes of liability for baggage. The records of the negotiation of the Convention accordingly support what is evident from its text: A passenger's injury must be caused by an accident, and an accident must mean something different than an "occurrence" on the plane. Like the text of the Convention, however, the records of its negotiation offer no precise definition of "accident."

Reference to the conduct of the parties to the Convention and the subsequent interpretations of the signatories helps clarify the meaning of the term. At a Guatemala City International Conference on Air Law in 1971, representatives of many of the Warsaw signatories approved an amendment to Article 17 which would impose liability on the carrier for an "event which caused the death or injury" rather than for an "accident which caused" the passenger's injury, but would exempt the carrier from liability if the death or injury resulted "solely from the state of health of the passenger." International Civil Aviation Organization, 2 Documents of the International Conference on Air Law, Guatemala City, ICAO Doc. 9040–LC/167–2, p. 189 (1972). The Guatemala City Protocol of 1971 and the Montreal Protocols Nos. 3 and 4 of 1975 include this amendment, see S. Exec. Rep. No. 98–1 (1983), but have yet to be ratified by the Senate, and therefore do not govern the disposition of this case. The statements of the delegates at Guatemala City indicate that they viewed the switch from "accident" to "event" as expanding the scope of carrier liability to passengers. The Swedish

Delegate, for example, in referring to the choice between the words "accident" and "event," emphasized that the word "accident" is too narrow because a carrier might be found liable for "other acts which could not be considered as accidents." See International Civil Aviation Organization, 1 Minutes of the International Conference on Air Law, ICAO Doc. 9040–LC/167–1, p. 34 (1972). See also Mankiewicz, Warsaw Convention: The 1971 Protocol of Guatemala City, 20 Am. J. Comp. L. 335, 337 (1972) (noting that changes in Article 17 were intended to establish "strict liability").

In determining precisely what causes can be considered accidents, we "find the opinions of our sister signatories to be entitled to considerable weight." *Benjamins* v. *British European Airways*, 572 F. 2d 913, 919 (CA2 1978), cert. denied, 439 U. S. 1114 (1979). While few decisions are precisely on point, we note that, in *Air France* v. *Haddad, Judgment of June 19, 1979*, Cour d'appel de Paris, Première Chambre Civile, 1979 Revue Française de Droit Aérien, at 328, a French court observed that the term "accident" in Article 17 of the Warsaw Convention embraces causes of injuries that are fortuitous or unpredictable. European legal scholars have generally construed the word "accident" in Article 17 to require that the passenger's injury be caused by a sudden or unexpected event other than the normal operation of the plane. See, *e. g.*, O. Riese & J. Lacour, Précis de Droit Aérien 264 (1951) (noting that Swiss and German law require that the damage be caused by an accident, and arguing that an accident should be construed as an event which is sudden and independent of the will of the carrier); 1 C. Shawcross & K. Beaumont, Air Law ¶ VII(148) (4th ed. 1984) (noting that the Court of Appeals for the Third Circuit's definition of accident accords with some English definitions and "might well commend itself to an English court"). These observations are in accord with American decisions which, while interpreting the term "accident" broadly, *Maugnie* v. *Compagnie Nationale Air France*, 549 F. 2d, at 1259, nevertheless refuse to extend the term to cover routine travel procedures that produce an injury due to the peculiar internal condition of a passenger. See, *e. g.*, *Abramson* v. *Japan Airlines Co.*, 739 F. 2d 130 (CA3 1984) (sitting in airline seat during normal flight which aggravated hernia not an "accident"), cert. pending, No. 84–939; *MacDonald* v. *Air Canada*, 439 F. 2d 1402 (CA5 1971) (fainting while waiting in the terminal for one's baggage not shown to be caused by an "accident"); *Scherer* v. *Pan American World Airways, Inc.*, 54 App. Div. 2d 636, 387 N. Y. S. 2d 580 (1976) (sitting in airline seat during normal flight which aggravated thrombophlebitis not an "accident").

III

We conclude that liability under Article 17 of the Warsaw Convention arises only if a passenger's injury is caused by an unexpected or unusual event or happening that is external to the passenger. This definition should be flexibly applied after assessment of all the circumstances surrounding a passenger's injuries. *Maugnie, supra,* at 1262. For example, lower courts in this country have interpreted Article 17 broadly enough to encompass torts committed by terrorists or fellow passengers. See *Evangelinos* v. *Trans World Airlines, Inc.*, 550 F. 2d 152 (CA3 1977) (en banc) (terrorist attack); *Day* v. *Trans World Airlines, Inc.*, 528 F. 2d 31 (CA2 1975) (en banc) (same), cert. denied, 429 U. S. 890 (1976); *Krystal* v. *British Overseas Airways Corp.*, 403 F. Supp. 1322 (CD Cal. 1975) (hijacking); *Oliver* v. *Scandinavian Airlines System*, 17 CCH Av. Cas. 18,283 (Md. 1983) (drunken passenger falls and injures fellow passenger). In cases where there is contradictory evidence, it is for the trier of fact to decide whether an "accident" as here defined caused the passenger's injury. See *DeMarines* v. *KLM Royal Dutch Airlines*, 580 F. 2d 1193 (CA3 1978) (contradictory evidence on whether pressurization was normal). See also *Weintraub* v. *Capitol International Airways, Inc.*, 16 CCH

Av. Cas. 18,058 (N. Y. Sup. Ct., 1st Dept., 1981) (plaintiff's testimony that "sudden dive" led to pressure change causing hearing loss indicates injury was caused by an "accident"). But when the injury indisputably results from the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft, it has not been caused by an accident, and Article 17 of the Warsaw Convention cannot apply. The judgment of the Court of Appeals in this case must accordingly be reversed.

We recognize that any standard requiring courts to distinguish causes that are "accidents" from causes that are "occurrences" requires drawing a line, and we realize that "reasonable [people] may differ widely as to the place where the line should fall." *Schlesinger* v. *Wisconsin*, 270 U. S. 230, 241 (1926) (Holmes, J., dissenting). We draw this line today only because the language of Articles 17 and 18 requires it, and not because of any desire to plunge into the "Serbonian bog" that accompanies attempts to distinguish between causes that are accidents and injuries that are accidents. See *Landress* v. *Phoenix Mutual Life Ins. Co.*, 291 U. S., at 499 (Cardozo, J., dissenting). Any injury is the product of a chain of causes, and we require only that the passenger be able to prove that some link in the chain was an unusual or unexpected event external to the passenger. Until Article 17 of the Warsaw Convention is changed by the signatories, it cannot be stretched to impose carrier liability for injuries that are not caused by accidents. It remains "[o]ur duty . . . to enforce the . . . treaties of the United States, whatever they might be, and . . . the Warsaw Convention remains the supreme law of the land." *Reed*, 555 F. 2d, at 1093.

Our duty to enforce the "accident" requirement of Article 17 cannot be circumvented by reference to the Montreal Agreement of 1966. It is true that in most American cases the Montreal Agreement expands carrier liability by requiring airlines to waive their right under Article 20(1) of the Warsaw Convention to defend claims on the grounds that they took all necessary measures to avoid the passenger's injury or that it was impossible to take such measures. Because these "due care" defenses are waived by the Montreal Agreement, the Court of Appeals and some commentators have characterized the Agreement as imposing "absolute" liability on air carriers. See Lowenfeld & Mendelsohn, 80 Harv. L. Rev., at 599. As this case demonstrates, the characterization is not entirely accurate. It is true that one purpose of the Montreal Agreement was to speed settlement and facilitate passenger recovery, but the parties to the Montreal Agreement promoted that purpose by specific provision for waiver of the Article 20(1) defenses. They did not waive other provisions in the Convention that operate to qualify liability, such as the contributory negligence defense of Article 21 or the "accident" requirement of Article 17. See *Warshaw*, 442 F. Supp., at 408. Under the Warsaw Convention as modified by the Montreal Agreement, liability can accordingly be viewed as "absolute" only in the sense that an airline cannot defend a claim on the ground that it took all necessary measures to avoid the injury. The "accident" requirement of Article 17 is distinct from the defenses in Article 20(1), both because it is located in a separate article and because it involves an inquiry into the nature of the event which *caused* the injury rather than the care taken by the airline to avert the injury. While these inquiries may on occasion be similar, we decline to employ that similarity to repeal a treaty provision that the Montreal Agreement on its face left unaltered.

Nor can we escape our duty to enforce Article 17 by reference to the equation of "accident" with "occurrence" in Annex 13 to the Convention on International Civil Aviation. The definition in Annex 13 and the corresponding Convention expressly apply to aircraft accident *investigations*, and not to principles of liability to passengers under the Warsaw Convention. See B. Cheng, The Law of International Air Transport 106–165 (1962).

Finally, respondent suggests an independent ground supporting the Court of Appeals' reversal of the summary judgment against her. She argues that her original complaint alleged a state cause of action for negligence independent of the liability provisions of the Warsaw Convention, and that her state negligence action can go forward if the Warsaw liability rules do not apply. Expressing no view on the merits of this contention, we note that it is unclear from the record whether the issue was raised in the Court of Appeals. We leave the disposition of this claim to the Court of Appeals in the first instance. See *Hoover* v. *Ronwin,* 466 U. S. 558, 574, n. 25 (1984).

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE POWELL took no part in the consideration or decision of this case.

ST. LOUIS SOUTHWESTERN RAILWAY CO. *v.* DICKERSON

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MISSOURI, EASTERN DISTRICT

No. 84–914. Decided March 4, 1985

Respondent railroad employee brought a personal injury action in a Missouri court against petitioner employer under the Federal Employers' Liability Act (FELA), alleging that a permanent disabling injury he received in a fall from a railroad car he was inspecting was the result of petitioner's negligence. Respondent introduced evidence that his future wage losses would be about $1 million, and petitioner requested that the judge instruct the jury that since respondent would have the use of any money awarded in a lump sum for loss of earnings in the future, the jury must determine the present value of the money awarded for such future loss. The judge refused to submit the instruction because such an instruction was not provided for in the Missouri Approved Instructions promulgated by the Missouri Supreme Court for use in FELA cases. The jury found for respondent, awarding $1 million in damages, and the Missouri Court of Appeals affirmed.

Held: As a general matter, FELA cases adjudicated in state courts are subject to state procedural rules, but the propriety of jury instructions concerning the measure of damages in such cases is an issue of "substance" to be determined by federal law. As a matter of federal law, a defendant in an FELA case is entitled to have the jury instructed that "when future payments or other pecuniary benefits are to be anticipated, the verdict should be made up on the basis of their present value only." *Chesapeake & Ohio R. Co.* v. *Kelly*, 241 U. S. 485, 491. Thus, the instruction requested here should have been given.

Certiorari granted; 674 S. W. 2d 165, reversed.

PER CURIAM.

In this case, the Missouri Court of Appeals upheld a trial court's refusal to instruct the jury in a Federal Employers' Liability Act case that its award to the plaintiff should reflect the present value of any future losses the plaintiff should sustain. Because such an instruction is required as a matter of federal law, we reverse.

On December 11, 1978, respondent, a railroad policeman, was permanently disabled in a fall from a railroad car that he was inspecting for evidence of vandalism. Alleging that the fall was the result of petitioner's negligence, he brought suit under the Federal Employers' Liability Act (FELA), 35 Stat. 65, as amended, 45 U. S. C. § 51 *et seq.*, in the Circuit Court of the city of St. Louis. Respondent introduced evidence that his future wage losses resulting from his injuries would, over the course of his lifetime, amount to somewhere in the neighborhood of $1 million.

Petitioner requested that the judge submit to the jury the following instruction:

> "If you find in favor of Plaintiff and decide to make an award for any loss of earnings in the future, you must take into account the fact that the money awarded by you is being received all at one time instead of over a period of time extending into the future and that Plaintiff will have the use of this money in a lump sum. You must, therefore, determine the present value or present worth of the money which you award for such future loss."

The trial judge refused to submit the instruction because such an instruction was not provided for in the Missouri Approved Instructions promulgated by the Supreme Court of Missouri for use in FELA cases. Accordingly, the jury instructions on damages were limited to the following:

> "If you find the issues in favor of plaintiff, then you must award plaintiff such sum as you believe will fairly and justly compensate plaintiff for any damages you believe he sustained and is reasonably certain to sustain in the future as a result of the fall on December 11, 1978 mentioned in the evidence. Any award you make is not subject to income tax."

The jury found that the fall was the result of petitioner's negligence and awarded respondent $1 million in damages.

The Missouri Court of Appeals affirmed. 674 S. W. 2d 165 (1984). Rejecting petitioner's contention that the failure to instruct the jury on present value was error, the court held that a present-value instruction was inappropriate as a matter of Missouri law. The court's ruling was in accord with two previous opinions of the Missouri Supreme Court holding that because the Missouri Approved Instructions do not call for a present-value instruction in FELA cases, such an instruction may not be given. *Bair* v. *St. Louis-San Francisco R. Co.*, 647 S. W. 2d 507 (en banc), cert. denied *sub nom. Burlington Northern Inc.* v. *Bair*, 464 U. S. 830 (1983); *Dunn* v. *St. Louis-San Francisco R. Co.*, 621 S. W. 2d 245 (1981) (en banc), cert. denied *sub nom. Burlington Northern R. Co.* v. *Dunn*, 454 U. S. 1145 (1982).

As a general matter, FELA cases adjudicated in state courts are subject to state procedural rules, but the substantive law governing them is federal. Although the Court's decisions in this area "point up the impossibility of laying down a precise rule to distinguish 'substance' from 'procedure,'" *Brown* v. *Western R. Co. of Alabama*, 338 U. S. 294, 296 (1949), it is settled that the propriety of jury instructions concerning the measure of damages in an FELA action is an issue of "substance" determined by federal law. *Norfolk & Western R. Co.* v. *Liepelt*, 444 U. S. 490, 493 (1980). Accordingly, petitioner's contention that it was entitled to a jury instruction on present value cannot be dismissed on the ground that such an instruction is not to be found in the Missouri Approved Instructions. Whether such an instruction should have been given is a federal question.

Not only is it a federal question, but it is also one to which existing law provides a clear answer. Nearly 70 years ago, this Court held that a defendant in an FELA case is entitled to have the jury instructed that "when future payments or other pecuniary benefits are to be anticipated, the verdict should be made up on the basis of their present value only."

Chesapeake & Ohio R. Co. v. *Kelly*, 241 U. S. 485, 491 (1916). The rationale for such an instruction is simple:

> "The damages should be equivalent to compensation for the deprivation of the reasonable expectation of pecuniary benefits that would have resulted from the continued life of the deceased. . . . So far as a verdict is based upon the deprivation of future benefits, it will afford more than compensation if it be made up by aggregating the benefits without taking account of the earning power of the money that is presently to be awarded. It is self-evident that a given sum of money in hand is worth more than the like sum of money payable in the future." *Id.*, at 489.

We have never disapproved of *Kelly* or its rationale. The Federal Courts of Appeals have continued to rely on *Kelly* as a definitive statement of the law applicable to FELA cases, see, *e. g.*, *Beanland* v. *Chicago, R. I. & P. R. Co.*, 480 F. 2d 109, 115 (CA8 1973), and we have ourselves recently reaffirmed our adherence to *Kelly*'s principle that damages awards in suits governed by federal law should be based on present value. See *Jones & Laughlin Steel Corp.* v. *Pfeifer*, 462 U. S. 523, 536–537 (1983). Although our decision in *Jones & Laughlin* makes clear that no single method for determining present value is mandated by federal law and that the method of calculating present value should take into account inflation and other sources of wage increases as well as the rate of interest, it is equally clear that an utter failure to instruct the jury that present value is the proper measure of a damages award is error. The Missouri courts' refusal to allow instruction of FELA juries on present value is thus at odds with federal law. The petition for a writ of certiorari is therefore granted, and the judgment is

Reversed.

JUSTICE POWELL took no part in the consideration or decision of this case.

JUSTICE MARSHALL, dissenting.

I continue to object to deciding cases without granting to either party an opportunity to argue the merits by either brief or oral argument. I therefore dissent.

HERB'S WELDING, INC., ET AL. *v.* GRAY ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 83-728. Argued October 3, 1984—Decided March 18, 1985

The Longshoremen's and Harbor Workers' Compensation Act (LHWCA), as amended in 1972, provides compensation for the death or disability of any person engaged in "maritime employment" (status requirement), if the disability or death results from an injury incurred upon the navigable waters of the United States or any adjoining pier or other area customarily used by an employer in loading, unloading, repairing, or building a vessel (situs requirement). Respondent Gray (hereinafter respondent), who worked for petitioner Herb's Welding, Inc., was injured while welding a gas flow line on a fixed offshore oil-drilling platform in Louisiana territorial waters. When petitioner United States Fidelity & Guaranty Co., the workers' compensation carrier for Herb's Welding, Inc., denied LHWCA benefits, respondent filed a complaint with the Department of Labor. Administrative proceedings ultimately resulted in the conclusion that respondent could recover by virtue of a provision of the Outer Continental Shelf Lands Act (Lands Act) that grants LHWCA benefits to offshore oil workers injured on the Outer Continental Shelf, since even though respondent had been injured in state waters rather than on the shelf, his injury could be said to have occurred "as a result of" operations on the shelf. The Court of Appeals affirmed, but relied directly on the LHWCA rather than on the Lands Act, concluding that both the status and the situs requirements of the LHWCA were met.

Held: Because respondent's employment was not "maritime," he does not qualify for benefits under the LHWCA. Pp. 419-427.

(a) The Court of Appeals' construction of the LHWCA—that offshore drilling is maritime commerce and that anyone performing any task that is part and parcel of that activity is in maritime employment for LHWCA purposes—is foreclosed by earlier decisions of this Court, and the legislative history of both the 1972 Amendments to the LHWCA and the Lands Act. Congress' purpose under the 1972 Amendments to the LHWCA was to cover those workers on a covered situs who are involved in the essential elements of the loading or unloading, or construction, of vessels. Respondent's welding work was far removed from such traditional LHWCA activities. Pp. 421-426.

(b) The argument that to deny coverage to someone in respondent's position would result in the sort of inconsistent, checkered coverage that Congress sought to avoid in 1972 is not compelling. The inconsistent coverage here results primarily from the explicit geographic limitations to the Lands Act's incorporation of the LHWCA. If Congress' coverage decisions are mistaken as a matter of policy, it is for Congress to change them. Pp. 426–427.

703 F. 2d 176 and 711 F. 2d 666, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and POWELL, REHNQUIST, and STEVENS, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, BLACKMUN, and O'CONNOR, JJ., joined, *post*, p. 428.

Wood Brown III argued the cause and filed a brief for petitioners.

Carolyn F. Corwin argued the cause for the federal respondent. With her on the brief were *Solicitor General Lee, Deputy Solicitor General Geller, Karen I. Ward, Allen H. Feldman,* and *Joshua T. Gillelan II. T. Gerald Henderson* argued the cause for respondent Gray. With him on the brief was *David W. Robertson.**

JUSTICE WHITE delivered the opinion of the Court.

The Longshoremen's and Harbor Workers' Compensation Act (LHWCA or Act), 44 Stat. 1424, as amended, 33 U. S. C. §901 *et seq.*, provides compensation for the death or disability of any person engaged in "maritime employment," §902(3), if the disability or death results from an injury incurred upon the navigable waters of the United States or any adjoining pier or other area customarily used by an employer in loading, unloading, repairing, or building a vessel, §903(a).[1] Thus, a worker claiming under the Act must satisfy both a "status" and a "situs" test. The court below held that respondent Robert Gray, a welder working on a fixed offshore oil-drilling platform in state territorial waters, was entitled to benefits under the Act. We reverse for the reason that Gray was not engaged in maritime employment.

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*Briefs of *amici curiae* urging reversal were filed for the Kerr-McGee Corp. by *Christopher Tompkins* and *René H. Himel, Jr.;* and for Texaco, Inc., et al. by *Robert M. Contois, Jr.*

[1] Section 2(3) of the Act, 86 Stat. 1251, 33 U. S. C. §902(3), provides: "The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew

I

Respondent Gray worked for Herb's Welding, Inc., in the Bay Marchand oil and gas field off the Louisiana coast. Herb's Welding provided welding services to the owners of drilling platforms. The field was located partly in Louisiana territorial waters, *i. e.*, within three miles of the shore, and partly on the Outer Continental Shelf. Gray ate and slept on a platform situated in Louisiana waters. He spent roughly three-quarters of his working time on platforms in state waters and the rest on platforms on the Outer Continental Shelf. He worked exclusively as a welder, building and replacing pipelines and doing general maintenance work on the platforms.

On July 11, 1975, Gray was welding a gas flow line on a fixed platform[2] located in Louisiana waters. He burnt

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of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net."

Section 3(a) of the Act, 33 U. S. C. § 903(a), provides in part:

"Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)."

[2] Offshore oil rigs are of two general sorts: fixed and floating. Hearings on S. 2318 et al. before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92d Cong., 2d Sess., 395–396, 480–486 (1972) (hereinafter Hearings). Floating structures have been treated as vessels by the lower courts. *E. g., Producers Drilling Co.* v. *Gray*, 361 F. 2d 432, 437 (CA5 1966). Workers on them, unlike workers on fixed platforms, see *Rodrigue* v. *Aetna Casualty & Surety Co.*, 395 U. S. 352 (1969), enjoy the same remedies as workers on ships. If permanently

through the bottom of the line and an explosion occurred. Gray ran from the area, and in doing so hurt his knee. He sought benefits under the LHWCA for lost wages, disability, and medical expenses.[3] When petitioner United States Fidelity & Guaranty Co., the workers' compensation carrier for Herb's Welding, denied LHWCA benefits, Gray filed a complaint with the Department of Labor. The Administrative Law Judge (ALJ), relying on our decision in *Rodrigue* v. *Aetna Casualty & Surety Co.*, 395 U. S. 352 (1969), ruled that because Gray's work was totally involved in the exploration for, and development and transmission of, oil and gas from submerged lands, it was not relevant to traditional maritime law and lacked any significant maritime connection. Gray therefore did not satisfy the LHWCA's status requirement.

The Benefits Review Board reversed on other grounds. 12 BRBS 752 (1980). By a vote of 2–1, it concluded that irrespective of the nature of his employment, Gray could recover by virtue of a provision of the Outer Continental Shelf Lands Act, 67 Stat. 462, 43 U. S. C. § 1331 *et seq.* (Lands Act), that

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attached to the vessel as crewmembers, they are regarded as seamen; if not, they are covered by the LHWCA because they are employed on navigable waters. See generally Robertson, Injuries to Marine Petroleum Workers: A Plea for Radical Simplification, 55 Texas L. Rev. 973, 982–992 (1977) (hereinafter Robertson). Gray is not in a position to take advantage of this line of cases. All, or almost all, the platforms in the field were fixed production platforms rather than floating rigs. Tr. of Oral Arg. in No. 77–LHCA–1308, before Benefits Review Board, p. 12. There has never been any dispute that Gray was injured on a fixed platform, nor any contention that he should be considered to have been on a vessel at the time of his injury. The only question, therefore, is whether Gray is limited to state workers' compensation remedies or may also recover under the LHWCA.

[3] Gray did recover under the Louisiana workers' compensation scheme, receiving weekly benefits totalling $3,172.50 over two years as well as $1,696.14 for medical expenses. These payments were credited against his later LHWCA recovery. See App. to Pet. for Cert. A–45. State workers' compensation and the LHWCA are not mutually exclusive remedies. *Sun Ship, Inc.* v. *Pennsylvania*, 447 U. S. 715 (1980).

grants LHWCA benefits to offshore oil workers injured on the Outer Continental Shelf.[4] Although Gray had been injured in state waters, the Board felt that his injury nonetheless could be said to have occurred, in the words of the statute, "as a result of" operations on the outer shelf. It considered his work "integrally related" to such operations. 12 BRBS, at 757. The dissenting Board member argued that the Lands Act provides LHWCA benefits only for injuries actually occurring in the geographic area of the outer shelf. *Id.*, at 761–763.

The Board reaffirmed its position after the case was remanded to the ALJ for entry of judgment and calculation of benefits, and petitioners sought review in the Court of Appeals for the Fifth Circuit. That court affirmed, relying directly on the LHWCA rather than on the Lands Act. 703 F. 2d 176 (1983). With regard to the Act's situs requirement, it noted that this Court had compared drilling platforms to wharves in *Rodrigue* v. *Aetna Casualty & Surety Co.*, *supra.* Given that the 1972 Amendments to the LHWCA extended coverage to accidents occurring on wharves, it would be incongruous if they did not also reach accidents occurring on drilling platforms. Also, since workers injured on movable barges, on fixed platforms on the Outer Continental Shelf, or en route to fixed platforms, are all covered, there would be a "curious hole" in coverage if someone in Gray's position was not. 703 F. 2d, at 177–178. As for Gray's status, the Court of Appeals, differing with the ALJ, held that Gray's work bore "a realistically significant relationship to traditional maritime activity involving navigation and commerce on navigable waters," *id.*, at 179–180, because it was an integral part of the offshore drilling process, which, the court had held in *Pippen* v. *Shell Oil Co.*, 661 F. 2d 378 (1981), was itself maritime commerce. We granted certiorari. 465 U. S. 1098 (1984).

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[4] The relevant section provides:

"With respect to disability or death of an employee resulting from any injury occurring as the result of operations conducted on the Outer Continental Shelf for the purpose of exploring for, developing, removing or transporting by pipeline the natural resources, or involving rights to the natural resources, of the subsoil and seabed of the outer Continental Shelf, compensation shall be payable under the provisions of the Longshoremen's and Harbor Workers' Compensation Act." 67 Stat. 463, as amended, 43 U. S. C. § 1333(b).

II

A

When extractive operations first moved offshore, all claims for injuries on fixed platforms proceeded under state workers' compensation schemes. See Hearings, at 396, 409, 411. See also Robertson 993. With the 1953 passage of the Lands Act, Congress extended LHWCA coverage to oil workers more than three miles offshore. 43 U. S. C. § 1333(b). Because until 1972 the LHWCA itself extended coverage only to accidents occurring on navigable waters, 33 U. S. C. § 903 (1970 ed.), and because stationary rigs were considered to be islands, *Rodrigue* v. *Aetna Casualty & Surety Co.*, *supra*, oil rig workers inside the 3-mile limit were left to recover under state schemes. See, *e. g.*, *Freeman* v. *Chevron Oil Co.*, 517 F. 2d 201 (CA5 1975); *Gifford* v. *Aurand Mfg. Co.*, 207 So. 2d 160 (La. App. 1968). Any worker, inside or outside the 3-mile limit, who qualified as a seaman was not covered by the LHWCA, but could sue under the Jones Act, 46 U. S. C. § 688, the Death on the High Seas Act, 46 U. S. C. § 761 *et seq.*, and the general maritime law. Hearings, at 411–414, 450–459, 487; see n. 1, *supra*. See also Wright, Jurisdiction in the Tidelands, 32 Tulane L. Rev. 175, 186 (1958).

So matters stood when Congress amended the LHWCA in 1972. What is known about the congressional intent behind that legislation has been amply described in our prior opinions. See, *e. g.*, *Director, OWCP* v. *Perini North River Associates*, 459 U. S. 297 (1983); *Sun Ship, Inc.* v. *Pennsylvania*, 447 U. S. 715, 717–722 (1980); *Northeast Marine*

Terminal Co. v. *Caputo*, 432 U. S. 249, 256–265 (1977). The most important of Congress' concerns, for present purposes, was the desire to extend coverage to longshoremen, harborworkers, and others who were injured while on piers, docks, and other areas customarily used to load and unload ships or to repair or build ships, rather than while actually afloat. Whereas prior to 1972 the Act reached only accidents occurring on navigable waters, the amended 33 U. S. C. § 903 expressly extended coverage to "adjoining area[s]." At the same time, the amended definition of an "employee" limited coverage to employees engaged in "maritime employment."

The Act, as amended, does not mention offshore drilling rigs or the workers thereon. The legislative history of the amendments is also silent, although early in the legislative process, a bill was introduced to extend the Act to all offshore oil workers. The bill died in Committee. While hardly dispositive, it is worth noting that the same Committee considered the 1972 Amendments to the LHWCA, and the possible extension of the Lands Act's application of the LHWCA to drilling platforms, apparently without it ever occurring to anyone that the two might have been duplicative. The concurrent but independent reconsideration of both the Lands Act and the LHWCA, the congressional view that the amendments to the latter involved the "[e]xtension of [c]overage to [s]horeside [a]reas," H. R. Rep. No 92–1441, p. 10 (1972), and the absence of any mention of drilling platforms in the discussion of the LHWCA, combine to suggest that the 1972 Congress at least did not intentionally extend the LHWCA to workers such as Gray.[5]

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[5] Petitioners view Congress' failure to extend LHWCA coverage to all offshore oil workers as an explicit rejection of the position adopted by the court below. However, it appears that the bill, S. 1547, was designed not so much to increase the benefits of those not covered, as to limit the remedies of those workers who could qualify as seamen and so were not confined to the workers' compensation scheme. See 117 Cong. Rec. 10490–10491

B

The rationale of the Court of Appeals was that offshore drilling is maritime commerce and that anyone performing any task that is part and parcel of that activity is in maritime employment for LHWCA purposes. Since it is doubtful that an offshore driller will pay and maintain a worker on an offshore rig whose job is unnecessary to the venture, this approach would extend coverage to virtually everyone on the stationary platform. We think this construction of the Act is untenable.

The Act does not define the term "maritime employment," but our cases and the legislative history of the amendments foreclose the Court of Appeals' reading. *Rodrigue* involved two men killed while working on an offshore drilling rig on the Outer Continental Shelf. Their families brought third-party negligence suits in federal court, claiming recovery under both the Death on the High Seas Act and the state law of Louisiana. The District Court ruled that resort could not be had to state law and that the High Seas Act provided the exclusive remedy. The Court of Appeals for the Fifth Circuit affirmed, holding that the men had been engaged in maritime activity on the high seas and that maritime law was the exclusive source of relief. We reversed. First, the platforms involved were artificial islands and were to be treated as though they were federal enclaves in an upland State. Federal law was to govern accidents occurring on these islands; but, contrary to the Court of Appeals, we held that the Lands Act and borrowed state law, not the maritime law, constituted the controlling federal law. The platforms "were islands, albeit artificial ones, and the accidents had no more connection with the ordinary stuff of admiralty than do

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(1971) (statement of Sen. Tower); Hearings, at 396–403, 418–419, 602. The bill was opposed because it would limit recoveries by those who did better without LHWCA coverage. *Id.*, at 589–590, 602. See generally *Boudreaux* v. *American Workover, Inc.*, 680 F. 2d 1034, 1053 (CA5 1982).

accidents on piers."[6] 395 U. S., at 360. Indeed, observing that the Court had previously "held that drilling platforms are not within admiralty jurisdiction," we indicated that drilling platforms were not even suggestive of traditional maritime affairs. *Id.*, at 360–361.

We also went on to examine the legislative history of the Lands Act and noted (1) that Congress was of the view that maritime law would not apply to fixed platforms unless a statute expressly so provided; and (2) that Congress had seriously considered applying maritime law to these platforms but had rejected that approach because it considered maritime law to be inapposite, a view that would be untenable if drilling from a fixed platform is a maritime operation. The history of the Lands Act at the very least forecloses the Court of Appeals' holding that offshore drilling is a maritime activity and that any task essential thereto is maritime employment for LHWCA purposes.[7]

We cannot assume that Congress was unfamiliar with *Rodrigue* and the Lands Act when it referred to "maritime employment" in defining the term "employee" in 1972.[8] It would have been a significant departure from prior understanding to use that phrase to reach stationary drilling rigs generally.

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[6] The dissent finds "substantial irony" in this analogy in light of the 1972 LHWCA Amendments, which extended coverage landward to piers. *Post*, at 433–434. The irony dissipates in light of the fact that while *Rodrigue* did observe that offshore platforms are *like* piers, its holding was that they *are* islands. 395 U. S., at 360. It has not been suggested that workers on islands are covered by the amended LHWCA.

[7] The dissent considers the Lands Act's extension of the LHWCA to platforms on the Outer Continental Shelf an indication that work thereon is maritime employment. *Post*, at 437–438. However, as the dissent acknowledges, the LHWCA has been extended to several emphatically nonmaritime locales. Undeterred, the dissent points out that Congress left regulation of offshore platforms to the Coast Guard. Yet one would not have expected otherwise, since geographically the platforms fall within the Coast Guard's jurisdiction. No one contends that offshore platforms are not offshore.

[8] We note also that the LHWCA covered an employee injured on navigable waters if his employer had at least one employee engaged in "maritime employment." In contrast, in providing for LHWCA coverage of

The Fifth Circuit's expansive view of maritime employment is also inconsistent with our prior cases under the 1972 Amendments to the LHWCA. The expansion of the definition of navigable waters to include rather large shoreside areas necessitated an affirmative description of the particular employees working in those areas who would be covered. This was the function of the maritime employment requirement. But Congress did not seek to cover all those who breathe salt air. Its purpose was to cover those workers on the situs who are involved in the essential elements of loading and unloading; it is "clear that persons who are on the situs but not engaged in the overall process of loading or unloading vessels are not covered." *Northeast Marine Terminal Co.* v. *Caputo*, 432 U. S., at 267. While "maritime employment" is not limited to the occupations specifically mentioned in §2(3),[9] neither can it be read to eliminate any requirement

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employees working in offshore oil fields, the Lands Act defined the term "employer" as "an employer any of whose employees are employed in such operations," *i. e.*, "exploring for, developing, removing, or transporting by pipeline the natural resources . . . of the subsoil and seabed of the outer Continental Shelf . . . ." 43 U. S. C. § 1333(b).

[9] The LHWCA covers "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker." By the use of the term "including," Congress indicated that the specifically mentioned occupations are not exclusive. See *P. C. Pfeiffer Co.* v. *Ford*, 444 U. S. 69, 77–78, n. 7 (1979); H. R. Rep. No. 92–1441, p. 11 (1972).

There have been occasional legislative efforts to limit the definition of "maritime employment" to enumerated tasks. For example, in 1980 Representative Erlenborn proposed deleting the "maritime employment" language and limiting coverage to "a longshoreman, ship repairman, ship builder, ship breaker, or harbor worker" who "was directly engaged in activities relating to such employment" when injured. H. R. 7610, 96th Cong., 2d Sess., § 2(a) (1980). His bill specifically excluded "any person of a connection with the loading or construction of ships. As we have said, the "maritime employment" requirement is "an occupational test that focuses on loading and unloading." *P. C. Pfeiffer Co.* v. *Ford*, 444 U. S. 69, 80 (1979). The Amendments were not meant "to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity." H. R. Rep. No. 92–1441, p. 11 (1972); S. Rep. No. 92–1125, p. 13 (1972). We have never read "maritime employment" to extend so far beyond those actually involved in moving cargo between ship and land transportation. Both *Caputo* and *P. C. Pfeiffer Co.* make this clear and lead us to the conclusion that Gray was not engaged in maritime employment for purposes of the LHWCA.[10]

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who, at the time of injury, was engaged in administration, clerical, custodial, delivery, maintenance, or repair of gear or equipment . . . or any other employments not direct and integral parts of vessel loading, unloading, repairing, building, or breaking." *Ibid.* The bill was referred to Committee, 126 Cong. Rec. 15417 (1980), and was never reported by the Committee.

[10] This view of "maritime employment" does not preclude benefits for those whose injury would have been covered before 1972 because it occurred "on navigable waters." *Director, OWCP* v. *Perini North River Associates*, 459 U. S. 297 (1983). No claim is made that Gray was injured "on navigable waters." Indeed, it was agreed by all counsel at oral argument that prior to 1972 Gray would not have been covered, except arguably by operation of the Lands Act. See Tr. of Oral Arg. 11, 46, 52–54. See also 703 F. 2d, at 179.

In light of the dissent's reliance on *Perini*, *post*, at 442–443, we point out that that decision was carefully limited to coverage of an employee "injured while performing his job upon actual navigable waters." 459 U. S., at 299; see *id.*, at 305, 311–312, 315, 324. The Court's rationale was that, first, any employee injured on navigable waters would have been covered prior to 1972, and, second, Congress did not intend to restrict coverage in adopting its "maritime employment" test. The holding was, "of course," limited to workers covered prior to 1972, *id.*, at 324, n. 34, a group to which Gray does not belong. The opinion says nothing about the contours of the status requirement as applied to a worker, like Gray, who was not injured on

Gray was a welder. His work had nothing to do with the loading or unloading process, nor is there any indication that he was even employed in the maintenance of equipment used in such tasks. Gray's welding work was far removed from traditional LHWCA activities, notwithstanding the fact that he unloaded his own gear upon arriving at a platform by boat. Tr. of Oral Arg. 56. He built and maintained pipelines and the platforms themselves. There is nothing inherently maritime about those tasks. They are also performed on land, and their nature is not significantly altered by the marine environment,[11] particularly since exploration and development of the Continental Shelf are not themselves maritime commerce.

The dissent emphasizes that Gray was generally on or near the water and faced maritime hazards. *Post*, at 445–449. To the extent this is so, it is relevant to "situs," not "status." To hold that Gray was necessarily engaged in maritime employment because he was on a drilling platform would ignore Congress' admonition that not everyone on a covered situs automatically satisfies the status test. See S. Rep. No. 92–1125, p. 13 (1972). The dissent considers "[t]he maritime nature of the occupation . . . apparent from examining

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navigable waters. To hold that enactment of the status requirement did not constrict prior coverage is wholly different from refusing to view that requirement as a meaningful limit on the Act's extended coverage.

[11] The general counsel to the International Association of Drilling Contractors stated to the Senate Subcommittee in 1972:

"Irrespective of design, bottom resting, semi-submersible, or full floating, these structures [drilling platforms] perform only as a base from which the drilling industry conducts its operations. The operations, once the structure is in place, are no different from that which takes place on dry land. All of the equipment and methods utilized in the drilling operations are identical to our land based operations. The exposure to employee injuries are the same. Accident frequency rates and severity of injury are no greater, in fact less, because of crew selection and confinement to an area permits concentrated training and safety programs." Hearings, at 410–411.

its location in terms of the expanded situs coverage of the 1972 Amendments." *Post,* at 446. We recognize that the nature of a particular job is defined in part by its location. But to classify Gray's employment as maritime because he was on a covered situs, *post,* at 448, or in a "maritime environment," *post,* at 450, would blur together requirements Congress intended to be distinct. We cannot thus read the status requirement out of the statute.[12]

III

Respondents, and the dissenters, object that denying coverage to someone in Gray's position will result in exactly the sort of inconsistent, checkered coverage that Congress sought to eliminate in 1972. In the words of the court below, it creates a "curious hole" in coverage, 703 F. 2d, at 178, because Gray would have been covered had he been injured on navigable waters or on the outer shelf.

We do not find the argument compelling. First, this submission goes far beyond Congress' undoubted desire to treat equally all workers engaged in loading or unloading a ship, whether they were injured on the ship or on an adjoining pier or dock. The former were covered prior to 1972; the latter were not. Both are covered under the 1972 Amendments. Second, there will always be a boundary to coverage, and there will always be people who cross it during their employment. *Nacirema Operating Co.* v. *Johnson,* 396 U. S. 212, 223–224 (1969). If that phenomenon was enough to require coverage, the Act would have to reach much further than anyone argues that it does or should. Third, the inconsistent coverage here results primarily from the explicit geographic limitation to the Lands Act's incorporation of the LHWCA. Gray would indeed have been covered for a significant portion of his work-time, but because of the Lands Act, not because he fell within the terms of the LHWCA.[13] Congress' desire to make LHWCA coverage uniform reveals little about the position of those for whom partial coverage results from a separate statute. This is especially true because that statute draws a clear geographical boundary that will predictably result in workers moving in and out of coverage.

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[12] Throughout these proceedings, Gray has argued that he need not satisfy the status/situs test because he falls within the Lands Act's incorporation of LHWCA benefits. See 43 U. S. C. § 1333(b). The Benefits Review Board so held. He repeats that argument in this Court, as he is free to do. *United States* v. *New York Telephone Co.,* 434 U. S. 159, 166, n. 8 (1977). However, it has not been fully briefed and argued here and was not discussed by the Court of Appeals. We therefore decline to consider it. See *Dandridge* v. *Williams,* 397 U. S. 471, 475–476, n. 6 (1970). It is open to the Court of Appeals on remand.

As we have said before in this area, if Congress' coverage decisions are mistaken as a matter of policy, it is for Congress to change them. We should not legislate for them. See *Victory Carriers, Inc.* v. *Law*, 404 U. S. 202, 216 (1971).

IV

Because Gray's employment was not "maritime," he does not qualify for benefits under the LHWCA. We need not determine whether he satisfied the Act's situs requirement. We express no opinion on his argument that he is covered by 43 U. S. C. § 1333(b). The judgment is reversed, and the case is remanded to the Court of Appeals for further proceedings consistent with this opinion.

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[13] Gray traveled between platforms by boat and might have been covered, before or after 1972, had he been injured while in transit. See *Director, OWCP* v. *Perini North River Associates*, 459 U. S., at 324. But see *id.*, at 324, n. 34 ("We express no opinion whether such coverage extends to a worker injured while transiently or fortuitously upon actual navigable waters"). Even if he would have been covered for some small fraction of his time independent of the Lands Act, however, he is a far cry from the paradigmatic longshoreman who walked in and out of coverage during his workday and spent substantial amounts of his time "on navigable waters." Any coverage attributable to the LHWCA itself was *de minimis*. We also note in passing a substantial difference between a worker performing a set of tasks requiring him to be both on and off navigable waters, and a worker whose job is entirely land-based but who takes a boat to work.

It is so ordered.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN, JUSTICE BLACKMUN, and JUSTICE O'CONNOR join, dissenting.

Today the Court holds that a marine petroleum worker is not covered by the Longshoremen's and Harbor Workers' Compensation Act (LHWCA or Act), 44 Stat. 1424, as amended, 33 U. S. C. § 901 *et seq.*, when pursuing his occupation on a fixed offshore rig within the 3-mile limit of a State's territorial waters. Although such an individual routinely travels over water as an essential part of his job and performs the rest of his job adjacent to and surrounded by water, he is not covered because, in the Court's view, his occupation is not "maritime employment." See § 2(3), 33 U. S. C. § 902(3). The Court reaches this conclusion even though a worker of the same occupation, working in the same industry, and performing the same tasks on a rig located in the same place, would be covered if that rig were one that was capable of floating.[1] Neither the Court nor any of the parties have identified any reason why Congress might have desired this distinction. To the contrary, a principal congressional goal behind the 1972 Amendments was to rid the Act of just such arbitrary distinctions derived from traditional admiralty jurisprudence. Because the coverage pattern that the Court adopts is at odds with the Act's 1972 Amendments, and because the accident here meets the Amendments' status and situs tests, I respectfully dissent.

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[1] "Floating" petroleum rigs are classified as vessels in admiralty jurisprudence, see *Producers Drilling Co.* v. *Gray*, 361 F. 2d 432, 437 (CA5 1966), and as such have long been within the Act's coverage. *Ante*, at 416–417, n. 2. It must be emphasized, however, that in admiralty law, the classification of a structure as "floating" turns only on its capacity to float, and not on the relevance of buoyancy to its typical use or its state at the time of an injury. Many "floating" offshore petroleum rigs are so classified because they are floated to their drilling sites; but once there, they are elevated above the water and supported by legs that rest on the ocean bottom. See *Producers Drilling Co., supra*, at 437 (classification includes "'almost any structure that once floated or is capable of floating on navigable waters . . .' and . . . includes 'special purpose structures not usually employed as a means of transport by water but designed to float on water'") (quoting *Offshore Co.* v. *Robison*, 266 F. 2d 769, 771 (CA5 1959). See also n. 14, *infra*.

I

At the outset, it is useful to examine the LHWCA's general coverage pattern, and, in particular, the purposes of its 1972 Amendments. Before 1972, LHWCA coverage was determined largely by the traditional "locality" test of maritime tort jurisdiction. Under that test, if an accident occurred on the navigable waters (which usually meant on a vessel) the worker was covered, no matter how close the accident may have been to the adjoining land or pier; in contrast, if an accident occurred on adjoining land, a pier, or a wharf there was only state coverage, no matter how close the accident may have been to the water's edge. See *Nacirema Operating Co.* v. *Johnson*, 396 U. S. 212 (1969). Cf. *Victory Carriers* v. *Law*, 404 U. S. 202 (1971). A longshoreman moving cargo from ship to pier was thus covered for injuries incurred on board the ship, but not for any injuries incurred after stepping onto the pier. *Nacirema Operating Co., supra.* See also *P. C. Pfeiffer Co.* v. *Ford*, 444 U. S. 69, 72 (1979) ("A single situs requirement . . . governed the scope of [the Act's] coverage").

Behind this system of "checkered coverage" stood the reality that federal and state workers' compensation schemes usually had very different benefit levels, the state benefit levels often being inadequate. See n. 2, *infra*. Thus, those workers whose professional lives might require that they move back and forth between water and adjoining land—"amphibious workers"—and whose protection was the principal goal of the LHWCA, had to rely for workers' compensation on an imperfect amalgam of federal and state workers' compensation laws. As critics noted, the system's adequacy in any given case was a function of the pure fortuity of a work-related accident's exact location.[2]

In 1972, Congress amended the Act, expanding coverage landward as a means of rationalizing the coverage pattern. This case involves two of the principal Amendments. First, Congress expanded the situs of coverage to include those areas immediately adjacent to the water, in which maritime workers would be likely to spend a large part of their working lives. The Act would now cover "disability or death result[ing] from an injury occurring upon the navigable waters of the United States *(including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)* . . . ." § 3(a), 33 U. S. C. § 903(a) (emphasis added). Congress thus broke with the tradition of applying the strict locality test of admiralty tort jurisdiction to limit LHWCA's coverage.

But if only the situs of coverage had been altered, a new problem would have been created. Expanding the situs landward would not only have brought uniform coverage to those occupations previously covered in part, it would also have brought within the covered situs large numbers of occupations whose members had never before been covered at all. Workers such as truckdrivers or clericals, though present on a pier at certain times as part of their employment, are engaging in purely land-bound, rather than amphibious, occupations. See *Northeast Marine Terminal Co.* v. *Caputo*, 432 U. S. 249, 267 (1977); S. Rep. 13; H. R. Rep. 10–11. To expand coverage to these workers, whose work lives take them back and forth between newly covered "adjoining area[s]" and uncovered inland locations, would create a serious demarcation line problem, and would also obviously recreate, and even enlarge, the problem of "checkered coverage" based on the fortuity of the exact location of a particular injury. Thus, Congress adopted a "status" test for coverage to exclude members of these land-bound occupations. "The 1972 Amendments thus changed what had been essentially only a 'situs' test of eligibility for compensation to one looking to both the 'situs' of the injury and the 'status' of the injured." See *Caputo*, *supra*, at 264–265.

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[2] As both the Senate and House Reports that accompanied the 1972 Amendments stated:

"[C]overage of the present Act stops at the water's edge; injuries occurring on land are covered by State Workmen's Compensation laws. The result is a disparity in benefits payable for death or disability for the same type of injury depending on which side of the water's edge and in which State the accident occurs.

"To make matters worse, most State Workmen's Compensation laws provide benefits which are inadequate . . . ." S. Rep. No. 92-1125, pp. 12-13 (1972) (hereinafter cited as S. Rep.); H. R. Rep. No. 92-1441, pp. 10-11 (1972) (containing identical language) (hereinafter cited as H. R. Rep.).

Under the "status" test, coverage was limited to those "engaged in maritime employment." § 2(3), 33 U. S. C. § 902(3):

> "The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker . . . ."[3]

Both changes together were part of an effort to rationalize the Act's coverage pattern. Congress wanted a system that did not depend on the "fortuitous circumstance of whether the injury occurred on land or over water," S. Rep. 13; H. R. Rep. 10–11, and it wanted a "uniform compensation system to apply to employees who would otherwise be covered . . .

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[3] The term employee is further limited by the exclusion of "[m]aster[s] or member[s] of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net." § 2(3), 33 U. S. C. § 902(3). The exclusion corresponds to "seamen" who enjoy Jones Act coverage. See 46 U. S. C. § 688. This exception is irrelevant to this case.

for part of their activity." *Ibid.* Analyzing this case in terms of Congress' stated goals and in terms of this Court's prior efforts to give meaning to the 1972 Amendments makes clear that the Act applies to marine petroleum workers such as Gray.

Workers on fixed offshore rigs are "amphibious workers" who spend almost their entire worklife either traveling on the navigable waters or laboring on statutorily covered pier-like areas immediately adjacent thereto. They are exposed on a daily basis to hazards associated with maritime employment. And most important, given the fact that workers on floating rigs are covered by the Act, the Court's result recreates exactly the type of "incongruous" coverage distinctions that Congress specifically sought to eliminate in 1972.

II

The Court analyzes only the "maritime employment" status test, finding that that issue disposes of the case and makes unnecessary any discussion of "situs." Although the Court starts its analysis from the premise that "[t]he Act does not define the term 'maritime employment,'" *ante,* at 421, its own analysis of the term is quite conclusory and inadequate. The Court focuses on traditional admiralty law's treatment of fixed petroleum platforms, as found in a 1969 admiralty decision of this Court and a 1953 statute. It thus ignores that it was precisely the desire to break with traditional admiralty law's rigid locality-based distinctions that motivated Congress' passage of the 1972 LHWCA Amendments. Although the pre-1972 law cited by the Court was specifically based on those distinctions, the Court concludes that that law "foreclose[s]" the possibility that these workers might be engaged in "maritime employment." *Ibid.* The Court thus offers a conclusion that comports neither with the structure of the 1972 Amendments nor with our prior cases interpreting the Amendments' purposes. Instead, it derives its conclusion from straightforward pre-1972 applications of the very admiralty law concept that the 1972 Amendments were intended to eliminate as a limit on LHWCA coverage—the concept that coverage should stop at the water's edge.

A

The Court constructs its interpretation of "maritime employment" around the premise that the 1972 Congress had no desire to alter the law of *Rodrigue* v. *Aetna Casualty & Surety Co.*, 395 U. S. 352 (1969), a pre-1972 admiralty case that had nothing to do with the LHWCA. In *Rodrigue*, wrongful-death actions were brought in admiralty under the Death on the High Seas Act, 41 Stat. 537, 46 U. S. C. § 761 *et seq.*, when two petroleum workers were killed on fixed offshore platforms on the Outer Continental Shelf. One worker was killed using a crane on a platform to unload a barge, the other fell from a derrick high above a platform. *Rodrigue* presented the issue of whether admiralty jurisdiction existed with regard to these accidents, either by its own force or by force of the 1953 Outer Continental Shelf Lands Act (Lands Act), 67 Stat. 462, 43 U. S. C. § 1331 *et seq.* (prescribing choice of law to govern the Outer Continental Shelf). We unanimously held that traditional admiralty jurisdiction did not reach the situs of a fixed offshore rig, and that Congress, in passing the Lands Act, did not desire to alter this result.

The *Rodrigue* Court's reasoning as to admiralty law's inapplicability was straightforward, and is best found in a statement that has substantial irony, given the current Court's insistence that *Rodrigue* tells us what Congress meant in the 1972 LHWCA Amendments: The *Rodrigue* Court declared that "[a]dmiralty jurisdiction has not been construed to extend to accidents on piers, jetties, bridges, or even ramps or railways running into the sea." 395 U. S., at 360. *Rodrigue* concluded, as the Court now emphasizes, that drilling platforms have "'no more connection with the ordinary stuff of admiralty than do accidents on piers.'" *Ante*, at 421–422 (quoting 395 U. S., at 360). This may be so, but it is clear that the 1972 LHWCA Amendments were intended to expand LHWCA coverage well beyond the bounds of traditional admiralty law. Most obviously, they were meant to reach accidents on the very piers that *Rodrigue* had analogized to fixed oil platforms. § 3(a), 33 U. S. C. § 903(a). *Rodrigue* correctly stated that fixed platforms (like piers), are localities unconnected with "the ordinary stuff of admiralty." 395 U. S., at 360. However, it is just as clear that the very purpose of the 1972 Amendments was to expand LHWCA coverage beyond the "ordinary stuff" of traditional admiralty jurisprudence.[4]

That *Rodrigue*'s holding was based on the application of admiralty's traditional locality test cannot be doubted, and it would likely have been so understood by Congress in 1972. For example, just prior to the 1972 LHWCA Amendments' passage, this Court cited *Rodrigue* as one of more than 40 cases following the traditional view that "'[i]n regard to torts . . . the jurisdiction of the admiralty is exclusively dependent upon the locality of the act.'"[5] Given this basis of *Rodrigue*, there is simply no necessary relation between that case and the meaning of the "maritime employment" status test under the post-1972 LHWCA. Rather than mandate a result in the instant case, *Rodrigue* is irrelevant to its disposition.[6]

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[4] Indeed, we have explicitly refused to interpret the word "maritime" as used in the § 2(3)'s status test according to the limits that we have applied to the word's usage in the maritime jurisdictional statute. *Director, OWCP* v. *Perini North River Associates*, 459 U. S. 297, 320, n. 29 (1983) ("Although the term 'maritime' occurs [in] both . . . , these are two different statutes 'each with different legislative histories and jurisprudential interpretations over the course of decades'") (quoting *Boudreaux* v. *American Workover, Inc.*, 680 F. 2d 1034, 1049–1050 (CA5 1982)).

[5] *Victory Carriers* v. *Law*, 404 U. S. 202, 205, and n. 2 (1971) (quoting Justice Story in *Thomas* v. *Lane*, 23 F. Cas. 957, 960 (No. 13,902) (CC Me. 1813). See also Swaim, Yes, Virginia, There Is An Admiralty: The *Rodrigue* Case, 16 Loyola L. Rev. 43 (1969–1970) (criticizing *Rodrigue* as an example of a particularly narrow application of the traditional locality test). In *Nacirema Operating Co.* v. *Johnson*, 396 U. S. 212, 215, n. 6 (1969), we stated that *Rodrigue* affirmed the "settled doctrine" that structures like piers were not within traditional admiralty situs. The 1972 Amendments, of course, explicitly overturned the application of this "settled doctrine" to the LHWCA.

B

The Court also focuses on the legislative history of the 1953 Lands Act, as discussed in *Rodrigue*, to show that long before the 1972 Amendments Congress had determined that workers on fixed platforms were not "engaged in maritime activity." *Ante*, at 422–423. But the 1953 determination was simply to provide law for the Outer Continental Shelf without altering the traditional locality test of admiralty coverage. There is no reason to assume that that decision governs the meaning of a 1972 statute that had nothing to do with the Outer Continental Shelf and was otherwise explicitly meant to alter this very admiralty rule. In that sense, the congressional intent behind the Lands Act might be as irrelevant to this case as is *Rodrigue*'s discussion of traditional admiralty tort locality.

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[6] *Rodrigue*'s irrelevance to the meaning of the post-1972 "maritime employment" test is illustrated by the fact that one of the *Rodrigue* decedents, Dore, was killed in an activity that would clearly have been within post-1972 LHWCA coverage, using a crane to unload a barge that was docked at the oil rig. 395 U. S., at 353. Even under the analysis used by the Court today, such a worker would be "engaged in maritime employment." Yet in *Rodrigue*, Dore's unloading work and the other worker's oil derrick work were both viewed as equally beyond "the ordinary stuff of admiralty." *Id.*, at 360.

The Court defends *Rodrigue*'s relevance to this case in a curious way. The Court asserts that *Rodrigue* had gone beyond simply analogizing drilling platforms to piers, and actually *held* that drilling platforms "*are* islands." *Ante*, at 422, n. 6. This is put forth as if to imply that *Rodrigue*'s holding rested on something other than a simple analysis of traditional maritime tort locality. But relevant maritime law recognized no legal distinction between injuries on "piers" and injuries on "islands." Both were equally understood simply to be injuries on localities that were not "on the navigable waters." *Rodrigue*'s additional metaphor equating drilling platforms with islands added no additional legal point to that decision. It is, to say the least, peculiar to now look back on that opinion's casual choice of metaphors as a basis for determining the contours of subsequently created legal rights in an unrelated statute.

The irrelevance of *Rodrigue*'s Lands Act analysis can best be seen by examining the point in the legislative history that *Rodrigue* most emphasized: The Lands Act Congress chose not to adopt admiralty law as the exclusive law for Outer Continental Shelf fixed platform workers because of those workers' close ties to shore communities. 395 U. S., at 361–365. Those ties gave offshore workers and shore communities a shared interest in those workers' continued access to state protective legislation. *Id.*, at 362. Because of this, the Lands Act Congress viewed "maritime law [as] inapposite to . . . fixed structures," *id.*, at 363; but that supports no inference that in 1972 Congress desired to exclude these workers from the LHWCA definition of "maritime employment."

In 1972, Congress clearly did not seek to limit LHWCA coverage according to a worker's connection to the shoreside community, and indeed, it is hard to argue that that was ever a factor limiting LHWCA coverage. First, the principal targets of both the 1972 expansion of coverage and the initial 1927 Act were longshoremen and harborworkers; both are groups significantly more closely tied to their shoreside communities than are offshore petroleum workers.[7] Second, Congress was well aware that workers on floating rigs had a long history of coverage under the LHWCA, see n. 1, *supra*, and yet they are not argued to be less "connected" to the shore communities than are those on fixed platforms. Third, and most important, Congress provided that post-1972 LHWCA coverage—unlike traditional admiralty law coverage—would not deprive a worker of access to state remedies. "[T]he 1972 extension of federal jurisdiction supplements, rather than supplants, state compensation law." *Sun Ship, Inc.* v. *Pennsylvania,* 447 U. S. 715, 720 (1980). Congress thus made clear that there would be no incompatibility between "maritime" status and a close connection to the shoreside State.

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[7] While longshoremen and harborworkers work and live in the shoreside communities, offshore petroleum workers may work on facilities located in the open sea, and may be required to live on these facilities for prolonged periods of time. In the Gulf of Mexico, for example, the prevailing practice is for offshore workers to live on the drilling rigs for seven days, followed by seven days away from the rigs. International Labour Office, Safety Problems in the Offshore Petroleum Industry 19 (1978). This obviously makes the work less "connected" to the shore community. Respondent Gray testified that this was his schedule. Tr. in 77–LHCA–1308, before Administrative Law Judge, p. 31.

In general, a close connection between an arguably "maritime" occupation and the shoreside community may very well form the basis of a decision not to exclusively apply admiralty law coverage to the affairs of that occupation. Indeed, that is just the rationale *Rodrigue* attributed to the Congress that passed the Lands Act. But, as is shown by the above factors, the same rationale cannot explain the coverage of the post-1972 LHWCA.[8]

Although *Rodrigue*'s analysis of the Lands Act is largely irrelevant to the issues in the instant case, a closer examination of the Lands Act as a whole reveals that its authors held views which actually support coverage in this case. In a number of instances unrelated to the *Rodrigue* case, the Lands Act evidences a congressional understanding that work on fixed offshore platforms has maritime attributes. Even though the Lands Act did not generally apply admiralty law to fixed rigs on the Outer Continental Shelf, it also did not leave the law of worker safety in the exclusive hands of the States. First, it explicitly provided for LHWCA coverage of Outer Continental Shelf fixed platform workers. See 43 U. S. C. § 1333(b). While application of the LHWCA to a locale does not necessarily indicate a congressional determination that the locale's activities are in some sense "maritime,"[9] the Lands Act goes substantially beyond this in indicating that there is a "maritime" component to worker safety problems on fixed oil rigs. In particular, Congress chose to vest authority for general safety regulation of fixed or floating platforms on the Outer Continental Shelf in the Coast Guard, "the agency traditionally charged with regulation and enforcement of maritime matters." *Pure Oil Co.* v. *Snipes*, 293 F. 2d 60, 66 (CA5 1961). See 43 U. S. C. § 1333(d). In accordance with that authorization, the Coast Guard promptly promulgated a code of safety regulations that reflected the existence of the same sort of hazards on these rigs as one would associate with "maritime" environments. See 21 Fed. Reg. 900 (1956).[10] Thus Congress and the Coast Guard have recognized that the offshore locality of platform workers' work significantly affects their working conditions.

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[8] It may be notable that in 1972 Congress explicitly overturned *Nacirema*'s holding that the LHWCA did not cover injuries on piers, but Congress has taken no action to overturn *Victory Carriers*' determination that workers on piers are not generally governed by admiralty law.

C

The Court's analysis in the instant case is flawed not only because it uses particularly irrelevant pre-1972 decisions to define the outer boundaries of "maritime employment," but also because its premise, that Congress understood "maritime employment" to be a clear pre-1972 concept, is itself highly suspect. In *Director, OWCP* v. *Perini North River Associates*, 459 U. S. 297 (1983), we emphasized that "maritime status" was a concept with little if any history in the LHWCA before the 1972 Amendments. See *id.*, at 307, n. 17. Its only appearance was in the requirement that an employee, to be covered, had to be employed by an employer "any of whose employees [were] employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock)." § 2(4), 33 U. S. C. § 902(4) (1970 ed.). Despite this language, "there was little litigation concerning whether an employee was in 'maritime employment' for purposes of being the employee of a statutory employer." *Perini, supra,* at 309–310. As a leading treatise describes the pre-1972 situation: "Workers who are not seamen but who nevertheless suffer injury on navigable waters are no doubt (or so the courts have been willing to assume) engaged in 'maritime employment' . . . . [N]o one seems to have doubted that they could recover under [LHWCA], provided only that the proof satisfied the 'navigable waters' test." G. Gilmore & C. Black, Law of Admiralty 428–430 (2d ed. 1975). Thus, in 1972, there was no well-defined occupational status concept of "maritime employment" within LHWCA jurisprudence. To the extent the concept had any pre-existing meaning, it implied very wide coverage of workers whose occupations required any regular presence on navigable waters. Cf. *Perini, supra.*[11]

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[9] Congress has used the LHWCA as a general worker's compensation statute in a variety of federal circumstances that have no maritime concerns. See *Perini*, 459 U. S., at 326, n. 1 (STEVENS, J., dissenting) (listing statutes that apply LHWCA to defense bases, the District of Columbia, etc.).

[10] The Fifth Circuit found in these initial regulations a determination that "whether . . . fixed or submersible, these oil well drilling structures located in the midst of the high seas present substantially all of the perils of the seas and are therefore to be regulated as such." *Pure Oil Co.* v. *Snipes*, 293 F. 2d 60, 66–67 (1961). The Coast Guard continues to regulate occupational safety and health on these structures, see 46 Fed. Reg. 2199 (1981) (Memorandum of understanding between U. S. Geological Survey and U. S. Coast Guard), and the regulations still reflect a concern for maritime dangers. See 33 CFR pts. 144 and 146 (1983) (requiring that platforms be equipped with buoyant work vests, life preservers, lifefloats, emergency communications equipment, general alarm systems, sufficient handrails, and buoys). See generally 33 CFR Subchapter N (1983).

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[11] A status-like doctrine called "maritime but local," which was quite similar to the Court's position today, was found in the early years of the LHWCA. This doctrine applied state rather than federal law to govern accidents on the waters if the worker's activities had no "direct relation" to navigation or commerce and if "the application of local law [would not] materially affect" the uniformity of maritime law. *Grant Smith-Porter* v. *Rohde,* 257 U. S. 469, 477 (1922). See also *Western Fuel Co.* v. *Garcia,* 257 U. S. 233, 242 (1921). Like the Court's approach, this concept was ill-defined, and it gave rise to "one of the most flourishing, as it was surely

III

After erroneously determining that its decision in this case is mandated by *Rodrigue* and the legislative history of the Lands Act, the Court turns to its formulation of a "test" for "maritime employment." Its discussion of the statutory language, legislative history, and prior Court interpretations of the "maritime employment" provision of § 2(3) is quite brief. Much of it is little more than a determination that in our prior cases and in the legislative history offshore drilling work was never specifically stated to be covered by the statute. See *ante*, at 423–424. Of course, none of these sources had ever purported to offer an exclusive list of covered occupations, and as the Court agrees, we have previously read the "maritime employment" concept as "not limited to the occupations specifically mentioned in § 2(3)." *Ante*, at 423. Nevertheless, the Court's analysis presumes there is little coverage outside the specific occupations listed.

The only "test" that the Court comes close to announcing seems to involve an inquiry into whether an occupation is sufficiently related to maritime commerce (which seems to be confined to ship construction and cargo moving, *ante*, at 423–424) for it to be within a class of tasks "inherently maritime." *Ante*, at 425. The Court offers no justification for why the category should be so limited, nor does it seriously evaluate whether fixed offshore rig workers could fall into the cate-

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the most depressing, branches of federal jurisprudence." G. Gilmore & C. Black, Law of Admiralty 420 (2d ed. 1975). See also *Perini, supra*, at 307. This Court eventually established that the LHWCA did not incorporate the "maritime but local" doctrine. See *Calbeck* v. *Travelers Insurance Co.*, 370 U. S. 114 (1962); cf. *Davis* v. *Department of Labor*, 317 U. S. 249 (1942); *Parker* v. *Motor Boat Sales*, 314 U. S. 244 (1941). More recently, this Court has explicitly held that the 1972 status requirement of § 2(3) did not reinsert in the Act this "concept that plagued maritime compensation law for more than 40 years." See *Perini, supra*, at 322. Unfortunately, the Court today comes quite close to accomplishing just that reinsertion.

gory of "maritime commerce." The content of such a category is not as self-evident as the Court assumes,[12] nor would all agree that offshore rig workers are self-evidently "nonmaritime."[13]

This "test" is adopted in spite of the fact that no prior decisions of this Court have held the status test to be so limited. *Caputo* and *P. C. Pfeiffer Co.* which the Court cites as if they had established those limits, *ante*, at 423–424, were decisions that analyzed the concept of occupational status as it applied to different aspects of longshoring operations. Although those decisions contain important discussions concerning the structure and history of the Act, the only discussions on the limits of "maritime employment" were within the particular factual setting of those cases, that is, the decisions only sought to distinguish among those occupations normally found on a pier during the loading and unloading of a ship. The decisions did not purport to limit the Act's coverage to that particular setting, nor did they try to define any precise limits for the occupational status test outside that setting.

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[12] For example, the Court accepts shipbuilding, which is included among § 2(3)'s enumerated occupations, as obviously "maritime." But contracts for shipbuilding were not traditionally considered within admiralty contract jurisdiction. See *People's Ferry Co.* v. *Beers*, 20 How. 393 (1858). See also Gilmore & Black, *supra*, at 16.

[13] For example, Gilmore and Black begin their treatise with a list of cases that are not within admiralty jurisdiction, but which might be considered intuitively "maritime." *Rodrigue* is among them. Gilmore & Black, *supra*, at 27. See also Alston, Admiralty Jurisdiction and Fixed Offshore Drilling Platforms: A Radical Plea Reconsidered, 28 Loyola L. Rev. 379 (1982) (urging admiralty coverage for workers on fixed platforms); Robertson, Injuries to Marine Petroleum Workers: A Plea for Radical Simplification, 55 Texas L. Rev. 973 (1977) (same). The Court's assertion that offshore oil workers are not engaged in "maritime commerce" is similarly conclusory. In contrast, the Court of Appeals concluded that extracting oil and gas from under the ocean floor and transporting it to the shore is a part of "maritime commerce." See 703 F. 2d 176, 180 (CA5 1983); see also *Pippen* v. *Shell Oil Co.*, 661 F. 2d 378, 384 (CA5 1981). Leaving aside intuitions about what constitutes "maritime commerce," I would note that the enterprise here is the same as that carried out by floating rigs, which are classified as vessels, see n. 1, *supra*, and are thus presumably within almost any definition of "maritime commerce."

In *Perini*, we held that a construction worker injured while working on a barge during the construction of a riverside sewage treatment plant was "engaged in maritime employment." Although *Perini*'s precise holding concerned only the occupational status of a worker injured while required to be on the actual navigable waters, the necessary implications of that holding are of course not limited to the facts of that case. The Court reads *Perini* as having no importance to an understanding of what the term "maritime employment" might mean outside the situation where a worker is injured on the actual navigable waters. *Ante*, at 424–425, n. 10. But the statute applies the term "maritime employment" to all coverage situations, with no hint that its meaning should radically change depending on an injury's exact situs. See *P. C. Pfeiffer Co.*, 444 U. S., at 78–79. Nor does the Act's structure or language allow for an interpretation that, in effect, exempts workers injured on the actual navigable waters from the requirement that they be "engaged in maritime employment." *Perini* declined to rest on a rationale that focused only on the situs of the injury. It instead saw location as significant principally because an occupation's location is an aspect of the occupation's status.

> "[W]e emphasize that we in no way hold that Congress meant for such employees to receive LHWCA coverage merely by meeting the situs test, and without any regard to the 'maritime employment' language. . . . We consider those employees to be 'engaged in maritime employment' not simply because they are injured in a historically maritime locale, but because they are required to perform their employment duties upon navigable waters." 459 U. S., at 323–324.

Although in the instant case the particular injury did not occur on the actual navigable waters, and in *Perini* it did, Gray's work did involve his repeated and required presence on the navigable waters. *Perini* and its approach to the status test are thus highly relevant.

Perini is also relevant because it repeatedly refused to rest its holding on any inquiry into whether the claimant's work had a "direct" or "substantial relation" to navigation or traditional notions of maritime commerce. See *Perini*, 459 U. S., at 311, n. 21, 315, 318. Such a test was urged on the Court as a test that would deny coverage to the claimant, and *Perini*, after extensively discussing the Act's history, see n. 11, *supra*, firmly concluded that the 1972 Congress did not mean to incorporate such an inquiry into the analysis of occupational status. The Court today offers an analysis quite close to that which *Perini* explicitly rejected.

IV

To determine whether an offshore fixed platform worker is "engaged in maritime employment" the Court should have turned to three principles that we have previously applied to such questions. First, prior cases make clear that we must interpret coverage in light of the overall purposes of the Act. A major purpose of the 1972 Amendments was to eliminate those aspects of the prior system that made coverage depend on the "fortuitous circumstance of whether the injury occurred on land or over water," S. Rep., at 13; H. R. Rep., at 10, and to provide workers with a "uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity." *Id.*, at 10–11. Cf. *Sun Ship*, 447 U. S., at 725–726 ("The legislative policy animating the LHWCA's landward shift was remedial [and] the amendments' framers acted out of solicitude for the workers").

Second, we have said that Congress' concerns in extending coverage went beyond a concern for the exact locations of any particular worker's work routine, and in that sense "maritime employment" is an "occupational rather than a geographic concept." *P. C. Pfeiffer Co., supra,* at 79.

Third, we have said that a major factor in the determination of "maritime employment" is whether the members of an occupation are "required to perform their employment duties upon navigable waters." *Perini, supra,* at 323–324.

A

In applying these principles to this case, it becomes clear that offshore fixed oil platform workers should be considered in "maritime employment." When viewed from an occupational perspective, it is a glaring fact that unless classified as Jones Act seamen, see n. 3, *supra,* all offshore oil rig workers who work on floating rigs are engaged in maritime employment for LHWCA purposes, for they all must work "on the actual navigable waters." See *Perini, supra,* at 323. See also n. 1, *supra.* Other than the fact that their rigs were a traditional admiralty situs, there is little to distinguish the job or location of a worker on a floating rig from those of a worker on a fixed rig. Physically, the structures may be quite similar.[14] For example, they are similarly small,[15] relatively isolated, and totally surrounded by the sea. The two types of structures are parts of similar enterprises and operations that are carried out in the same marine environment. Indeed, other than for the type of structure, the locations of the work are the same. Moreover, the work tasks are quite similar, as are the working conditions and hazards.[16] I can therefore see no reason to believe that Congress, in passing a measure designed to rationalize coverage patterns through an occupational test for coverage, would have wanted to treat these workers as belonging to two different occupations, one maritime and the other nonmaritime.[17]

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[14] See, *e. g.*, International Labour Office, *supra* n. 7, at 5 ("Jack-up rigs," which make up 42% of the world's floating rigs, are "self-elevating platforms equipped with legs which can be lowered until they reach the sea bed and support the main section of the drilling platform. Throughout the drilling process the platform is kept in the raised position above the water surface"). See also n. 1, *supra.*

[15] Although the record does not reflect the platform's size in this case, fixed and floating platforms are of similarly limited size. See Hearings on S.2318 et al. before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92d Cong., 2d Sess., 836 (1972) (hereinafter cited as Hearings) (oil company document calling a fixed platform with a "150-foot-square deck" a "real giant"); *id.*, at 834 (floating rig described as having a 200-foot-square deck).

In *Perini* we held that the fact that a worker is required to work over the actual navigable waters is weighty evidence of his or her maritime status. 459 U. S., at 323–324. This holding clearly calls for the inclusion of fixed rig workers within the maritime employment classification. Here, Gray's job was to do welding, as needed, on oil rigs scattered over the Bay Marchand oil field. He was thus required to live on a rig and regularly travel back and forth over water among the rigs in the oil field. The argument that Gray performed work over the actual navigable waters is trivialized by the Court when it characterizes him as "a worker whose job is entirely land-based but who takes a boat to work." *Ante,* at 427, n. 13. This was not simply the life of a land-based commuter who chose to travel to work by boat, it is the life of someone required to live and work in a marine environment and to engage in ocean travel as an integral part of his job duties. When traveling among the rigs he was no less at work than when he was on a rig doing welding jobs, so his job is one that requires his presence on the actual navigable waters.

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[16] Counsel for petitioners went so far as to declare: "The hazards are no different. . . . There are no differences at all. There is absolutely no difference between a person who is more or less permanently assigned to a vessel and drilling or a person who is more or less permanently assigned to a platform and drilling." Tr. of Oral Arg. 6.

[17] Beyond the similarity of the two classifications, additional factors militate against treating them as distinct occupations. For example, some workers work on both fixed and floating rigs. See, *e. g., Pippen* v. *Shell Oil Co.*, 661 F. 2d, at 383, n. 6 (75% of worker's time was on floating rigs and 25% on fixed rigs). Similarly, the distinction between "fixed" and "floating" rigs is not always a rigid one. Structures called "tender type platforms" include a fixed platform with floating "tender ships" moored adjacent thereto. See Hearings, at 480; W. Graff, Introduction to Offshore Structures 3, 25 (1981). The drilling operation is divided between the platform and the tender ship, and the two are usually connected by walkways so workers can move back and forth between them. See Robertson, 55 Texas L. Rev., at 997–998. In both these contexts, the Court's approach creates the same "walking in and out of coverage" situation that the 1972 Amendments sought to eliminate. Cf. *id.*, at 992 ("Admiralty law is notable for the presence of fine and often intuitively questionable distinctions that involve devastating consequences. But even within the context of a system accustomed to such line-drawing [the fixed/floating rig distinction] looks peculiar" (footnotes omitted)).

The maritime nature of the occupation is even more apparent from examining its location in terms of the expanded situs coverage of the 1972 Amendments. Assuming that a fixed offshore platform is a covered situs under § 3(a), then fixed platform workers could not simply be termed "land-based" workers. *Ibid.* Unlike typical "land-based" workers, they would spend virtually their entire work lives within the statute's covered "maritime situs"—that is, either on or immediately adjacent to the actual navigable waters. This is in fact the situation here, for a fixed offshore oil rig easily fits into § 3(a)'s situs test.

Section 3(a) provides that coverage extends to any "pier, wharf, dry dock, terminal, building way, marine railway, or other . . . area [adjoining the navigable waters] customarily used by an employer in loading, unloading, repairing, or building a vessel." 33 U. S. C. § 903(a). This describes the typical fixed offshore oil rig. Since a fixed rig is of limited size and completely surrounded by water, all materials and workers on the rig are brought there and unloaded over water, and thus a customary use of the rig is the loading and unloading of cargo and people. One commentator has characterized the situation as follows:

> "Worker transportation is one of the most basic problems associated with offshore operations. Transportation is accomplished either by boats or helicopters. High-speed crew boats transport work crews when time is available and the distance is less than about 50 miles. Helicopters transport crews and other personnel over long distances or when time is important. The transportation of equipment to offshore rigs is accomplished with work boats. These boats . . . are versatile, high powered, and essential to offshore operations. Thus, all platforms must be provided with mooring bits, bumpers, cranes, stairs, etc., for use with work boats and crew boats." W. Graff, Introduction to Offshore Structures 3 (1981).

The rig is thus an "area [adjoining the navigable waters] customarily used by an employer in loading [or] unloading . . . a vessel." § 3(a), 33 U. S. C. § 903(a).

Fixed rigs are also physically quite analogous to piers or wharves. They are of limited size, see n. 15, *supra*, so a worker almost anywhere on the deck would be aware of his close proximity to the water. Similarly, the decks are elevated over the water, built to provide access to the water, and situated so that working conditions are influenced by the surrounding marine environment. Given these factors, I have little problem classifying the whole of the platform as a covered situs,[18] either because it is an "other adjoining area customarily used by an employer in loading [or] unloading" or because it is analogous to a pier or wharf facility.

Given this determination, a fixed platform worker is quite distinct from the truckdriver or clerical worker who in the legislative history exemplifies the nonmaritime worker. See *supra*, at 430–431. Truckdrivers or clericals are land-bound workers whose work never takes them on the actual navigable waters, and only sporadically takes them on the pier-like areas brought under the LHWCA's coverage by the 1972 Amendments. The greatest part of their work is done in inland locales that are clearly beyond the coverage of the Act. Therefore, coverage of these workers under the Act could at most be "checkered" and "fortuitous." Avoiding such widespread "checkered coverage" was an envisioned function of the status test. See *supra*, at 430–432. Fixed rig workers, in contrast, are in a position to benefit from uniform coverage if classified as "maritime," for they are on a covered situs for the overwhelming part of their work. Classifying them as "maritime" in light of their constant and required presence on a covered situs conforms to Congress' desire for uniform coverage of those workers who would otherwise be partially covered. Under the Court's approach, they remain only partially covered.

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[18] In *Northeast Marine Terminal Co.* v. *Caputo*, 432 U. S. 249, 279–280 (1977), we held that the whole of a facility adjoining the water was a covered situs where part of the facility was used for loading vessels. See G. Gilmore & C. Black, Law of Admiralty 424 (2d ed. 1975) (urging a broad reading of the situs test to avoid unnecessary line-drawing problems).

A last reason for classifying these workers as maritime is that they face working conditions and hazards associated with their maritime location. This was clearly stated in the testimony of a high official of an offshore drilling company before a recent congressional hearing on offshore worker safety:

> "Offshore work has a special set of concerns because we are a hybrid industry. In one sense, we are an onshore industry that initially crept out over the water. But it is equally fair to characterize us as a maritime industry, the same as the merchant marine or any other.
>
> "In point of fact, we share all of the concerns of both the drilling and maritime industries, plus a few uniquely ours."[19]

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[19] Hearing on the Safety of Life at Sea and Safety on Oil and Gas Rigs on the Outer Continental Shelf before the Subcommittee on Panama Canal/Outer Continental Shelf of the House Committee on Merchant

The same sentiment is recognized in the delegation of regulatory authority to the Coast Guard and in the Coast Guard regulations, see n. 10, *supra*, and accompanying text, and has been noted by legal and occupational health authorities.[20] Clearly these workers do far more than just "breathe salt air." See *ante*, at 423.

B

The Court supports its conclusion that fixed offshore oil rig workers are nonmaritime by arguing that their work is similar to drilling work done on land. But this reasoning must fail for a number of reasons. First, it ignores that while the work is similar to work done on land, it is virtually identical to work on floating oil rigs—which is clearly maritime.

Second, the Court's reasoning ignores that many indisputably maritime occupations are quite analogous to nonmaritime occupations. A forklift or crane operator who moves cargo on a pier and a "checker" who inventories that cargo are considered longshoremen with maritime status, even though their work may be quite similar to that of inland workers in a warehousing operation. See *Caputo*, 432 U. S., at 249 ("checker" was engaged in "maritime employment"); see also *Perini*, 459 U. S. 297 (1983) (construction worker may be engaged in "maritime employment"). The issue is not whether job duties are similar to those of nonmaritime workers, but whether the enterprise in question

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Marine and Fisheries, 98th Cong., 1st Sess., 38 (1983) (testimony of T. S. McIntosh, executive vice-president and chief operating officer of the Zapata Corp. and president of the Zapata Off-Shore Co.).

[20] See Alston, 28 Loyola L. Rev., at 402–403; Robertson, 55 Texas L. Rev., at 994–996. See also International Labour Office, *supra* n. 7, at 19 (exposure to weather); *ibid.* (extended isolation may lead to morale, alcoholism, and safety problems); *id.*, at 21–23 (controlling fires and blow-outs may be more difficult because of inaccessibility of platform); *id.*, at 24 (confined space and isolation makes excessive noise a much more serious problem in offshore oil operations than in onshore oil operations); *id.*, at 27 (slipperiness, clutter, weather conditions, and danger of falling overboard can make transfer of supplies dangerous).

necessitates that work be done in a maritime environment. Longshoring work, regardless of its similarity to other jobs, must be done on or adjacent to the navigable waters. Similarly, the extraction of oil from beneath the ocean floor necessitates that certain tasks be done over and adjacent to the ocean.

Third, the Court's reasoning ignores that whatever the similarities to land-based work, the work schedules, working conditions, and job hazards of offshore workers are in some ways quite different from their land-based counterparts. And most of the differences are the result of the offshore workers' proximity to the sea. See *supra*, at 448–449.

V

For the reasons discussed above, respondent Gray was "engaged in maritime employment" within the meaning of § 2(3) of the Act. It is also clear that a fixed offshore petroleum platform is a covered situs within the meaning of § 3(a) of the Act. I would thus affirm the Court of Appeals.

NATIONAL RAILROAD PASSENGER CORPORATION *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY CO. ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 83-1492. Argued January 15, 1985—Decided March 18, 1985*

The Rail Passenger Service Act of 1970 (Act or RPSA) was enacted in an attempt to revive the failing intercity passenger train industry. For this purpose the Act established the National Railroad Passenger Corporation (Amtrak), a private, for-profit corporation, authorized to operate, or contract with private railroads for the operation of, intercity rail passenger service. Most private railroads offering such service entered into "Basic Agreements" with Amtrak, and thereby, as provided by the Act, shed their intercity rail passenger obligations. Section 7.5 of each Basic Agreement, which concerned railroad employees' privileges to travel on Amtrak trains for free or at reduced fares, gave Amtrak discretion to determine such privileges. When a controversy arose over Amtrak's decision to cut back on these privileges, Congress in 1972 added § 405(f) to the RPSA to restore the privileges as they existed when Amtrak took over passenger rail service in 1971. But § 405(f) also required the railroads to pay, at a reimbursement rate determined by the Interstate Commerce Commission, for such costs as might be incurred by Amtrak in providing for the pass privileges. In 1979, Congress decided that the ICC's reimbursement rate resulted in inadequate compensation to Amtrak, and accordingly amended § 405(f) to require the railroads to reimburse Amtrak for pass-rider service at the rate of "25 percent of the systemwide average monthly yield per revenue passenger mile" for two years. In 1981, § 405(f) was again amended to provide that the 25 percent reimbursement requirement remain in effect indefinitely. Five railroads filed suit against Amtrak in Federal District Court, challenging the constitutionality of § 405(f) on the grounds that the reimbursement requirement violated the Due Process Clause of the Fifth Amendment. The United States intervened in the suit as a defendant. The District Court granted summary judgment in favor of Amtrak and the United States, holding that the Act did not constitute a contract between the United States and the railroads, that therefore

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*Together with No. 83-1633, *Atchison, Topeka & Santa Fe Railway Co. et al.* v. *National Railroad Passenger Corporation*, also on appeal from the same court.

§405(f) did not impair an obligation of the United States under a contract, and that moreover §405(f) did not impair the Basic Agreements. The Court of Appeals affirmed in part and reversed in part, holding that the railroads could be compelled to reimburse Amtrak for the incremental cost of carrying the pass riders, but that the "windfall" to Amtrak under the 1979 amendment, whereby the railroads were required to pay more than the incremental cost, violated the Due Process Clause, because it unreasonably and illegally impaired the railroads' rights under the Basic Agreements.

Held:

1. Section 405(f) is constitutional. Pp. 465–479.

(a) The RPSA does not constitute a binding obligation of Congress. Neither the language of the Act nor the circumstances surrounding its passage manifest any intent on Congress' part to bind itself contractually to the railroads. Pp. 465–470.

(b) The Basic Agreements do not grant the railroads a contractual right against the United States to be free from all obligation to provide passenger service. Those Agreements are not contracts between the railroads and the United States but simply between the railroads and Amtrak. Pp. 470–471.

(c) Section 405(f)'s payment obligation does not unconstitutionally impair the railroads' private contractual rights under the Basic Agreements. Those Agreements relieved the railroads only of common carriage responsibilities and not of the responsibility to provide their employees with pass privileges, for no state or federal law imposed that responsibility on them, as common carriers, when the Agreements were executed. It was not until after the Agreements were signed and Amtrak operations were underway, that Congress imposed new obligations on both parties to the Agreements. Pp. 472–475.

(d) Even if the railroads have a private contractual right not to pay more than the incremental cost of the pass privileges, the Due Process Clause does not limit Congress' power to choose a different reimbursement scheme. Congress' decision to assess the railroads was rational, and the railroads have not met their burden of proving irrationality and thus have not proved a due process violation. Pp. 475–478.

2. The railroads have no contractual right to be free from the obligation to make any payments to Amtrak, even for incremental costs. Nothing in the RPSA or the Basic Agreements suggests that the railroads were relieved of the responsibility to reimburse Amtrak for the pass privileges in question. Pp. 478–479.

723 F. 2d 1298, reversed.

MARSHALL, J., delivered the opinion of the Court, in which all other Members joined, except POWELL, J., who took no part in the decision of the cases.

Paul F. Mickey, Jr., argued the cause for appellant in No. 83–1492 and appellee in No. 83–1633. With him on the briefs were *William R. Perlik, David R. Johnson,* and *Andrea Timko Sallet.*

Samuel A. Alito, Jr., argued the cause for the United States as appellee under this Court's Rule 10.4 in support of appellant in No. 83–1492 and appellee in No. 83–1633. With him on the brief were *Solicitor General Lee, Acting Assistant Attorney General Willard, Leonard Schaitman,* and *Al J. Daniel, Jr.*

George A. Platz argued the cause for appellees in No. 83–1492 and appellants in No. 83–1633. With him on the brief were *Howard J. Trienens, Thomas W. Merrill,* and *W. A. Brasher.*

JUSTICE MARSHALL delivered the opinion of the Court.

The question presented in these cases is whether Congress violates the Due Process Clause of the Fifth Amendment by requiring private railroads to reimburse the National Railroad Passenger Corporation (Amtrak) for rail travel privileges that Amtrak provides to the railroads' employees and former employees, and their dependents.

I

A

From the middle of the 19th century, the railroad passenger coach played a significant and sometimes romantic role in American cultural and economic life. By the middle of this century, however, "this time-honored vehicle" threatened to "take its place in the transportation museum along with the stagecoach, the sidewheeler, and the steam locomotive."[1] Whereas in 1929 about 20,000 intercity trains operated in the country,[2] by 1946, there were only about 11,000 such passenger trains; by 1971, fewer than 500 passenger trains still operated.[3] As cars, buses, and airplanes displaced the passenger railroads, those railroads that continued to provide passenger carriage incurred heavy and continuing losses. At the same time, as common carriers these railroads were bound to continue providing service until the Interstate Commerce Commission (ICC) or state regulatory authorities relieved them of this responsibility. Given the tremendous operating losses, many of the remaining handful of railroads operating passenger coaches sought ICC permission to discontinue passenger train service.

The Rail Passenger Service Act of 1970 (Act or RPSA), 84 Stat. 1327, 45 U. S. C. § 501 *et seq.* (1970 ed.), which took effect on May 1, 1971, was Congress' effort to "revive the failing intercity passenger train industry and retain a high-quality rail passenger service for the Nation."[4] On concluding that a reorganized and restructured rail passenger system could be successful, Congress established the National Railroad Passenger Corporation, a private, for-profit corporation that has come to be known as Amtrak.[5] The corporation is not "an agency or establishment" of the Government but is authorized by the Government to operate or contract for the operation of intercity rail passenger service.[6] The Act outlined a procedure under which private railroads could obtain relief from their passenger-service obligations by transferring those responsibilities to Amtrak;[7] the Act authorized the new corporation to enter into standardized contracts with the private railroads, under which a railroad would be relieved "of all [its] responsibilities as a common carrier of passengers by rail in intercity rail passenger service under [Subtitle IV of Title 49] or any State or other law relating to the provision of intercity passenger service." 45 U. S. C. § 561(a)(1) (1970 ed.).[8]

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[1] Hosmer, Examiner, Report and Recommended Order, Railroad Passenger Train Deficit, ICC Docket No. 31954, p. 69 (1958) (as quoted in G. Hilton, Amtrak: The National Railroad Passenger Corporation 9 (1980)).

[2] P. Dorin, Amtrak: Trains & Travel 14 (1979).

[3] H. R. Rep. No. 91-1580, pp. 2-3 (1970).

[4] GAO, Comptroller General, Nos. B-196907, CED-80-83, Report to the Congress, How Much Should Amtrak Be Reimbursed for Railroad Employees Using Passes to Ride Its Trains? (GAO Report), App. 48.

[5] H. R. Rep. No. 91-1580, at 5. Initially the corporation was to be named "Railpax." The corporation instead independently adopted the official nickname "Amtrak," which is a contraction of "American" and "Track." N. Y. Times, Apr. 20, 1971, p. 86, col. 7.

To obtain relief from their common carrier obligations, the railroads had to agree to several conditions. First, "[i]n consideration of being relieved of this responsibility," a railroad was to pay Amtrak an amount equal to one-half of that railroad's financial losses from intercity passenger service during 1969. § 561(a)(2). Participating railroads also were to provide Amtrak with the use of tracks, other facilities, and services at rates to be agreed upon by the parties or, in the event of disagreement, to be set by the ICC. §§ 561, 562. The Act also included a labor protection provision requiring the railroads to "provide fair and equitable arrangements to protect the interests of employees affected by discontinuances of intercity rail passenger service." § 565(a). Participating railroads were required to enter into "protective arrangements" with their unions, in which the railroads promised to protect dislocated employees and to preserve employee benefits, including pension rights and fringe benefits. §§ 565(a)–(e).

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[6] H. R. Rep. No. 91–1580, at 5.

[7] Railroads that chose not to discontinue passenger service remained subject to the obligation to provide that service imposed on common carriers by the Interstate Commerce Act (ICA), 49 U. S. C. §§ 10908 and 10909. Section 404 of the RPSA, 45 U. S. C. § 564 (1970 ed.), declared a 5-year moratorium on the discontinuance of any intercity passenger train by any railroad that had not transferred its responsibilities to Amtrak, but authorized those railroads to seek discontinuances, through the procedures of the ICA, at the end of the 5-year period. See 49 U. S. C. § 13a (1970 ed.), recodified at 49 U. S. C. §§ 10908, 10909. In addition, all railroads remained subject to common carrier obligations to transport freight. 49 U. S. C. § 10903 *et seq.*

[8] The Act originally referred to the common carrier obligations under Part I of the ICA, see 84 Stat. 1328, 1334; that provision of the ICA was recodified in 1978 as Subtitle IV (§ 10101 *et seq.*) of Title 49, which is entitled "Interstate Commerce."

Finally, in § 301 of the Act, 45 U. S. C. § 541 (1970 ed.), Congress "expressly reserved" its right to "repeal, alter or amend this Act at any time."

All but five private railroads offering intercity passenger service took up the option provided by the Act and entered into contracts, known as "Basic Agreements," with Amtrak.[9] The participating railroads made the required payments to Amtrak and shed their intercity rail passenger obligations. On May 1, 1971, Amtrak began rail passenger service.

The Basic Agreements between the railroads and Amtrak mirrored the provisions of the Act. For example, § 2.1 of each Basic Agreement, entitled "Relief from Responsibility," relieved the signatory railroad "of its entire responsibility for the provision of Intercity Rail Passenger Service." App. 13. The Agreements also required the railroads to make services, tracks, and facilities available and to protect employees who would be affected by a discontinuance of passenger service.

Section 7.5 of each Basic Agreement, entitled "Transportation Privileges," spelled out the rights of the railroads and their employees to make use of Amtrak trains. The fifth paragraph, which concerned the rights of railroad employees to travel on Amtrak trains for free or at reduced fares, provided that "[t]ransportation privileges, if any, with respect to business and personal travel of Railroad personnel shall be as determined by [Amtrak]." The paragraph did not specify which party was to bear the cost of the transportation.

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[9] The five nonparticipating railroads were Southern Railway Co., Denver & Rio Grande Western Railroad, Chicago, Rock Island & Pacific Railroad, Georgia Railroad, and Canadian Pacific Railway Co.. GAO Report, App. 48.

Shortly after Amtrak began operation, considerable controversy arose over Amtrak's decision to cut back employee pass privileges pursuant to the discretion accorded in this provision. The result of that controversy has given rise to this action, and we turn to consider the evolution of this dispute.

B

Since the 1880's, railroad employees and retirees, and their dependents, have been able to ride passenger trains for free or at reduced rates. Before Amtrak assumed operation, the private railroads often permitted current and retired employees and their dependents to travel on the employees' home lines for free or at reduced rates, and many railroads had reciprocal agreements permitting employees and dependents of other railroads to travel at reduced rates as well.[10]

At the time Amtrak was created, between 1.4 million and 2 million rail-travel passes were outstanding.[11] Exercising its discretion under § 7.5 of the Basic Agreements, the corporation decided to confine pass privileges to employees of the railroads that operated trains for Amtrak, and to limit those privileges to half-rate fares. As a result, all railroad employees lost their pre-Amtrak access to completely free transportation, and employees of some railroads lost their pass privileges entirely. Amtrak then was faced with vehement protests from the railroads, which continued to operate both freight trains and some passenger service, and which asserted that the withdrawal of free transportation privileges for their employees threatened to produce severe labor problems for them.[12] The corporation thereafter restored some, but not all of the canceled privileges.

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[10] See GAO Report, App. 47.

[11] Affidavit of Roger Lewis, App. 40.

[12] *Ibid.*

The railroads continued to protest vigorously the Amtrak decision to cut back pass-rider privileges. They also reaffirmed their concern about employee morale and the possibility of labor strikes if privileges were not restored. Congress responded to this problem in 1972 by amending the RPSA to restore free or reduced-rate transportation to all people who had enjoyed such privileges when Amtrak took over passenger rail service. Pub. L. 92–316, § 8, 86 Stat. 230–231. The new § 405(f) of the Act, 45 U. S. C. § 565(f) (1976 ed.) (1972 amendment), required Amtrak to assure, "to the maximum extent practicable," that all employees and dependents who had received free or reduced-rate transportation before Amtrak began operation would continue to be eligible for such benefits. In their Committee Reports, both the Senate and the House emphasized that railroad employees should not lose their longstanding pass privileges—privileges they had earned through years of service—simply on account of the transfer of service to Amtrak.[13] Amtrak implemented this amendment by permitting pass riders to travel free or at half fare depending on the length of an employee's railroad employment, whether the employee was retired, and whether he was traveling on or off the rail lines of his home railroad.[14] In addition, pass riders were eligible for travel on a space-available basis only; they were permitted to make reservations only 24 hours in advance on trains requiring reservations; and they were not permitted to use the passes on Amtrak's special trains called Metroliners.

The 1972 amendment also required the railroads to pay for "such costs as may be incurred" by Amtrak in providing the pass privileges mandated by § 405(f). As the Senate

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[13] See S. Rep. No. 92–756, pp. 11–12 (1972) ("The Committee believes that employees who were entitled to free or reduced-rate transportation before the advent of Amtrak should not lose such privileges on account of the transfer of passenger service from the railroads to Amtrak"); see also H. R. Rep. No. 92–905, p. 11 (1972).

[14] See GAO Report, App. 53–54.

Committee explained: "Because Congress is merely continuing pass policies which the railroads themselves developed, it would appear that the railroads and not Amtrak should bear the cost, if any." S. Rep. No. 92–756, p. 11 (1972). The amendment did not specify how the costs were to be calculated but did provide that the ICC should resolve the issue if Amtrak and the railroads were unable to agree on the amount to be paid. The matter eventually was referred to the ICC, which set an interim reimbursement rate based on Amtrak's incremental operating costs of providing the service—that is, based on the additional cost to Amtrak to transport the riders. The initial rate was $.00079 per passenger mile. This amount was to be offset by the revenue derived from the reduced-rate fares paid by pass riders riding pursuant to the 1972 amendment.[15] The railroads also were to pay Amtrak for the administrative costs of the program. When the offset formula was applied, the revenue derived from the reduced-rate fares always exceeded the payments otherwise due from the railroads. As a result, the railroads reimbursed Amtrak solely for the pass program's administrative costs.[16] From 1972 to 1979, Amtrak collected from the railroads only administrative expenses amounting to about $500,000 per year.[17]

In 1979, however, Congress decided that the ICC's reimbursement rate resulted in inadequate compensation to Amtrak. Accordingly, in the Amtrak Reorganization Act of 1979, Pub. L. 96–73, § 120 (a), 93 Stat. 547 (Reorganization Act), Congress amended the § 405(f) pass-rider provision to require that the railroads prospectively reimburse Amtrak for pass-rider service at the rate of "25 percent of the systemwide average monthly yield per revenue passenger mile"—a rate that amounted to approximately one-fourth of the normal fare for ticket-buying passengers. The new rate was to remain in effect for two years.[18]

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[15] *Determination of Cost Reimbursement Under Section 405(f) of the Rail Passenger Service Act*, No. 27194, as amended, Dec. 21, 1972, App. 23–38 (unamended decision reported at 347 I. C. C. 325 (1972)).

[16] GAO Report, App. 51.

[17] 723 F. 2d 1298, 1300 (CA7 1983).

At the same time, Congress also directed the Comptroller General to conduct a study and, "taking into account the value of the services being provided," § 120(b), to make recommendations on the appropriate way to reimburse Amtrak for the cost of providing pass-rider transportation. In 1980, the General Accounting Office submitted a report to Congress that analyzed in detail two methods of reimbursement. GAO Report, App. 42–86. The report first considered reimbursing Amtrak for its incremental cost in providing the service, and second, for the value *to the pass rider* of the service being provided, which would be less than the fare charged a regular passenger, but which the report otherwise declined to quantify. Neither approach was necessarily the correct one, GAO decided: "Amtrak's costs to provide transportation to pass riders are debatable, and we did not find adequate analytical evidence to support one position over another or to recommend a specific means to reimburse Amtrak." *Id.*, at 43. The report therefore concluded that the choice between the two cost reimbursement formulas was "a policy decision that the Congress should make," *id.*, at 80; instead of offering an answer, the report simply outlined the available options. *Ibid.*

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[18] After the amendment, Amtrak billed the railroads at rates from .02067 cents to .02343 cents per passenger mile. *Ibid.* In the first 10 months of operation under the 1979 amendment, the railroads represented to the Court of Appeals that they paid the following additional sums: Santa Fe, $336,249.82; Burlington Northern, $490,344.72; Chesapeake & Ohio and Baltimore & Ohio, $76,345.34; and Union Pacific, $287,784.66. *Id.*, at 1300, n. 2. Of course, as the years go by, the number of eligible pass riders declines because of employee and retiree deaths. Whereas amendment of the RPSA in 1972 gave free or reduced rate transportation to about 2.83 million people, in December 1979 only about 1.05 million eligible pass riders remained. GAO Report, App. 56.

After receiving the report, Congress again amended §405(f) of the Act and provided that the 25-percent reimbursement requirement would remain in effect indefinitely. Pub. L. 97–35, 95 Stat. 697 (1981 amendment).

C

The cases we consider began in 1980 when five railroads, each of which had taken advantage of the RPSA and discontinued passenger service, filed suit against Amtrak in the United States District Court for the Northern District of Illinois challenging the constitutionality of §405(f) of the Act.[19] They argued that the requirement that they reimburse Amtrak for the pass travel of their employees, former employees, and dependents violated the Due Process Clause of the Fifth Amendment.

The railroads based this claim on four theories. First, they claimed they had a contractual right against the United States, derived from the RPSA and the Basic Agreements, to be free from the obligation to provide intercity rail passenger service. They asserted that §405(f), which had been added to the Act in 1972, therefore impaired an obligation of the United States under this statutory contract because pass privileges constituted the "intercity rail passenger service," from which the railroads had been relieved of their "entire responsibility" in the RPSA. Thus, since Congress had contracted in the RPSA to relieve the railroads of intercity rail passenger service, and the railroads had fulfilled their obligations under the contract, they had a right to be free from the responsibility to provide pass privileges. Congress, they claimed, was impairing its contractual obligation through passage of §405. Next, the railroads claimed that even if the Act itself were not a contractual obligation, the Basic

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[19] The five railroads are Atchison, Topeka, and Santa Fe Railway Co., Burlington Northern, Inc., Chesapeake and Ohio Railway Co., Baltimore and Ohio Railroad Co., and Union Pacific Railroad Co.

Agreements, with identical "relief from responsibility" language, were such a contractual obligation of the United States; that obligation, the railroads asserted, was unconstitutionally impaired by the subsequent legislation. Third, they argued that, even if no contract existed between the United States and the railroads, the statutory requirement that the railroads pay Amtrak for allowing pass riders constituted a deprivation of property without due process. Finally, the railroads argued that, even if Congress might constitutionally require the railroads to reimburse Amtrak for the cost of the pass-rider program, the particular reimbursement formula set forth in the 1979 amendment exceeded the incremental cost to Amtrak of providing the service and therefore constituted a deprivation of property without due process. After the 1981 amendment was passed, the railroads amended their complaint to make their claims applicable to that amendment as well.

The railroads filed a motion for summary judgment, and Amtrak filed a cross-motion for summary judgment. The United States then intervened as a defendant under 28 U. S. C. § 2403 and filed a motion to dismiss or, in the alternative, for summary judgment. The District Court entered an order granting summary judgment in favor of Amtrak and the United States. 577 F. Supp. 1046 (1982). It concluded that the Act, as amended, did not constitute a contract between the United States and the railroads. It then assumed that the Basic Agreements were contracts between the United States and the railroads and held that § 405(f) did not impair that contract. The District Court found that the Agreements relieved the railroads of their *responsibility* to provide intercity rail service, but that by the railroads' own admission they never had a legal or contractual responsibility to provide free or reduced rate transportation to employees and their families. The court also observed that the Basic Agreements gave to Amtrak the discretion to determine what pass privileges, if any, the railroad employees should have.

The District Court rejected the railroads' argument that the requirement that they pay for their employees' pass-rider privileges violated due process and ruled that the railroads had not overcome the firmly established presumption of constitutionality that attaches to legislative Acts "'adjusting the burdens and benefits of economic life.'" *Id.*, at 1052 (quoting *Usery* v. *Turner Elkhorn Mining Co.*, 428 U. S. 1, 15 (1976)). Because the legislation at issue was neither arbitrary nor irrational, the District Court concluded that the reimbursement requirement of § 405 did not violate due process under the *Turner Elkhorn* standard.

Finally, the court rejected the railroads' argument that Congress' reimbursement formula violated due process by requiring the railroads to pay more than the incremental cost to Amtrak of transporting the pass riders. "Having determined that the Congress acted constitutionally in requiring the railroads to reimburse Amtrak for the pass rider service, this court will not second-guess the legislative branch on its selection of a particular mathematical formula for reimbursement, absent a showing that the formula was selected in an arbitrary or irrational manner." 577 F. Supp., at 1055. The court then traced Congress' decisionmaking process to demonstrate that the choice of reimbursement plans was a rational policy decision, particularly in light of the conclusion in the GAO Report that the reimbursement issue involved a policy choice for Congress.

The Court of Appeals for the Seventh Circuit affirmed in part and reversed in part. 723 F. 2d 1298 (1983). The Court of Appeals rejected most of the railroads' arguments and held that the railroads could be compelled to reimburse Amtrak for the incremental cost of carrying the pass riders. The panel held, however, that the Basic Agreements provided the railroads with a contractual right to be free from having to "finance aspects of [Amtrak] operations that were once part of the railroads' entire responsibility for the provision of intercity rail passenger service." *Id.*, at 1302. According to the Court of Appeals, because the reimbursement scheme in the 1979 amendment required the railroads to pay more than the incremental cost to Amtrak, these payments supported Amtrak's general intercity rail passenger service operations, and the statute therefore impaired the railroads' right to be free from the responsibility for providing intercity rail passenger service. The court ruled that this "windfall" to Amtrak violated the Due Process Clause, because it unreasonably and illegally impaired the rights of the railroads under the Basic Agreements.[20]

Amtrak appealed to this Court under 28 U. S. C. § 1252, arguing that the reimbursement formula in § 405(f) is constitutional, and we noted probable jurisdiction. 469 U. S. 813 (1984). The railroads cross-appealed, contending that any reimbursement violates due process. We deferred ruling on whether jurisdiction over the cross-appeal was proper until consideration of the cases on the merits. *Ibid.*[21]

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[20] The court did not expressly state whether the statute impaired a private obligation between Amtrak and the railroads, or as the railroads maintained, a contract to which the United States was a party as well.

[21] We now find that jurisdiction over the cross-appeal is proper. The railroads filed their jurisdictional statement on cross-appeal within 30 days of their receipt of appellant's jurisdictional statement, as required by this Court's Rule 12.4. If the filing was properly a cross-appeal, then this procedure was jurisdictionally sound. We hold that the filing was properly a cross-appeal.

Title 28 U. S. C. § 1252 provides that "[a]ny party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States . . . holding an Act of Congress unconstitutional in any civil action . . . to which the United States or any of its agencies . . . is a party." In *Regan* v. *Taxation With Representation of Washington*, 461 U. S. 540, 543, n. 3 (1983), this Court ruled that the language of § 1252 was sufficiently broad to encompass the cross-appeal, which would not otherwise have been a proper appeal. This reading of § 1252 is buttressed by the fact that once we have properly asserted jurisdiction under § 1252, "the whole case is to come before us." *Heckler* v. *Edwards*, 465 U. S. 870, 879 (1984). Since the railroads correctly filed a cross-appeal in this case, the procedures for taking a cross-appeal under this

II

The railroads argue that the RPSA and the Basic Agreements created a contractual obligation on the part of the United States not to reimpose any rail passenger service responsibilities on those railroads that entered into Basic Agreements, and that the pass-rider amendments to the Act unconstitutionally impair the "contract" into which the United States entered. Thus, the railroads conclude, the Court of Appeals correctly held that the 1979 and 1981 amendments substantially impaired their contractual rights and violated due process, but incorrectly ruled that the 1972 amendment, which required only that the railroads pay for the incremental cost to Amtrak of the pass riders, was constitutional. In making these arguments, the railroads argue first that the United States entered into a contractual relationship with the railroads, either through the RPSA or the Basic Agreements, and second that the scope of the contractual agreements encompassed reimbursement for pass-rider privileges. But, the railroads assert that, even if their contractual rights were only private ones with Amtrak, those private contractual agreements created a right to be free from paying for pass-rider privileges. They maintain that the 1979 and 1981 amendments, as well as the 1972 assessment of incremental costs, therefore unconstitutionally impaired those private contractual rights. We consider, and reject, each of these arguments in turn.

A

The first question we address is whether the RPSA constituted not merely a regulatory policy but also a contractual arrangement between the United States and the railroads that entered into Basic Agreements. For many decades, this Court has maintained that absent some clear indication

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Court's Rule 12.4 were properly invoked, the cross-appeal was timely, and we have jurisdiction over the cross-appeal.

that the legislature intends to bind itself contractually, the presumption is that "a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise." *Dodge* v. *Board of Education,* 302 U. S. 74, 79 (1937). See also *Rector of Christ Church* v. *County of Philadelphia,* 24 How. 300, 302 (1861) ("Such an interpretation is not to be favored"). This well-established presumption is grounded in the elementary proposition that the principal function of a legislature is not to make contracts, but to make laws that establish the policy of the state. *Indiana ex rel. Anderson* v. *Brand,* 303 U. S. 95, 104–105 (1938). Policies, unlike contracts, are inherently subject to revision and repeal, and to construe laws as contracts when the obligation is not clearly and unequivocally expressed would be to limit drastically the essential powers of a legislative body. Indeed, "'[t]he continued existence of a government would be of no great value, if by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation.'" *Keefe* v. *Clark,* 322 U. S. 393, 397 (1944) (quoting *Charles River Bridge* v. *Warren Bridge,* 11 Pet. 420, 548 (1837)). Thus, the party asserting the creation of a contract must overcome this well-founded presumption, *Dodge, supra,* at 79, and we proceed cautiously both in identifying a contract within the language of a regulatory statute and in defining the contours of any contractual obligation.

In determining whether a particular statute gives rise to a contractual obligation, "it is of first importance to examine the language of the statute." *Dodge* v. *Board of Education, supra,* at 78. See also *Indiana ex rel Anderson* v. *Brand, supra,* at 104 ("Where the claim is that the State's policy embodied in a statute is to bind its instrumentalities by contract, the cardinal inquiry is as to the terms of the statute supposed to create such a contract"). "If it provides for the execution of a written contract *on behalf of the state* the case for an obligation binding upon the state is clear." 302 U. S., at 78 (emphasis supplied). But absent "an adequate expression of an actual intent" of the State to bind itself, *Wisconsin & Michigan R. Co.* v. *Powers*, 191 U. S. 379, 386–387 (1903), this Court simply will not lightly construe that which is undoubtedly a scheme of public regulation to be, in addition, a private contract to which the State is a party.

The language of the RPSA discloses absolutely no congressional intention to have the United States enter into a private contractual arrangement with the railroads. By its terms, the Act does not create or speak of a contract between the United States and the railroads, and it does not in any respect provide for the execution of a written contract *on behalf of the United States.* Quite to the contrary, the Act expressly established the National Railroad Passenger Corporation as a nongovernmental entity, 45 U. S. C. § 541, and it used the term "contract" not to define the relationship of the United States to the railroads, but instead that of the new, nongovernmental corporation to the railroads. The statute states clearly that "the Corporation is authorized to contract and, upon written request therefor from a railroad, shall tender a contract . . . ," 45 U. S. C. § 561(a), and that, "[u]pon its entering into a valid contract . . . , the railroad shall be relieved of all its responsibilities. . . ." *Ibid.* We simply cannot agree with the railroads that the frequent usage in a statute of the language of contract, including the term "contract," evidences an intent to bind the Federal Government contractually. Legislation outlining the terms on which private parties may execute contracts does not on its own constitute a statutory contract, but is instead an articulated policy that, like all policies, is subject to revision or repeal. Indeed, lest there be any doubt in these cases about Congress' will, Congress "expressly reserved" its rights to "repeal, alter, or amend" the Act at any time. 45 U. S. C. § 541. This is hardly the language of contract.[22]

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[22] In the *Sinking Fund Cases*, 99 U. S. 700 (1879), this Court recognized the effect of these few simple words. In that case, railroads challenged Congress' amendment of statutes that governed their obligations to the

Moreover, the circumstances of the Act's passage belie an intent to contract away governmental powers. Congress long had regulated the railroads and had compelled them through the ICC to continue unprofitable service and undertake new service. Indeed, the huge sums that the railroads insist they paid to Amtrak in "consideration" for the contractual right to be free from their passenger service obligations represented just one-half of the annual losses they suffered in one year under the prior regulatory scheme.

This atmosphere of pervasive prior regulation leads to several conclusions. For one, Congress would have struck a profoundly inequitable bargain if, in exchange for the equivalent of a half year's losses, it had entered into a binding contract never to impose on the railroads—which would continue to operate their potentially profitable freight services—any rail passenger service obligations at all.[23] Congress simply

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Government on securities issued to aid the initial construction of the railways. The Court rejected the argument that the amendment improperly interfered with vested rights and observed that through the language of reservation "Congress not only retains, but has given special notice of its intention to retain, full and complete power to make such alterations and amendments of the charter as come within the just scope of legislative power." *Id.*, at 720.

We also reject the railroads' argument that this clause reserved only the power to repeal, alter, or amend the National Railroad Passenger Corporation's corporate charter. The clause expressly reserved the right to change "this Act," and we see no ground to support the railroads' attempt to limit this term merely to a single aspect of the Act.

[23] The Act also required the railroads to enter into agreements with the new corporation to provide operational assistance and facilities at rates to be set by contract (or the ICC in the event of disagreement), 45 U. S. C. § 562 (1970 ed.), and to enter into arrangements to protect the interests of employees disadvantaged by the discontinuance of passenger service. § 565(a). These requirements either were consistent with the railroads' continuing obligations as common carriers, or easily might have been imposed as conditions by the ICC if it granted the railroads' petition to discontinue rail passenger service. See 49 U. S. C. §§ 10903(a)(2), 11101. Far from analogous to consideration, these ongoing regulatory obligations

cannot be presumed to have nonchalantly shed this vitally important governmental power with so little concern for what it would receive in exchange. Cf. *United States Trust Co.* v. *New Jersey*, 431 U. S. 1, 21–25 (1977) (considering reserved powers doctrine). Also, the pervasiveness of the prior regulation in this area suggests that absent some affirmative indication to the contrary, the railroads had no legitimate expectation that regulation would cease after 1971. Coupled with the statute's express reservation of the power to repeal, the heavy and longstanding regulation of this area strongly cuts against any argument that the statute created binding contractual rights. Cf. *Energy Reserves Group, Inc.* v. *Kansas Power & Light Co.*, 459 U. S. 400, 413 (1983) (discussing implications of pervasive regulation for inquiry into substantial impairment of a contract).

The railroads argue nevertheless that the RPSA created a contractual obligation "closely analogous to the statutory covenant" at issue in *United States Trust*, "which this Court held to be a contractual obligation of a State subject to the Contract Clause." Brief for Appellees in No. 83–1492, p. 18. Far from recognizing the similarity, we find that the statute at issue in *United States Trust Co.* v. *New Jersey* highlights the difference between the RPSA and a true statutory contract. In *United States Trust*, the Court held that New Jersey could not retroactively alter a statutory bond covenant relied upon by bond purchasers. The covenant in that case was a part of the bistate legislation authorizing the Port Authority of New York and New Jersey to acquire, construct, and operate the Hudson & Manhattan Railroad and the World Trade Center in New York City. The statute read in part: "The 2 States covenant and agree with each other and with the holders of any affected bonds, as hereinafter defined, that so long as any of such bonds remain

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further demonstrate that the RPSA was a legislative policy decision, not a private contractual arrangement.

outstanding and unpaid . . . neither the States nor the port authority nor any subsidiary corporation incorporated for any of the purposes of this act will apply any of the rentals, tolls, fares, fees, charges, revenues or reserves, which have been or shall be pledged in whole or in part as security for such bonds, for any railroad purposes whatsoever other than permitted purposes hereinafter set forth." 1962 N. J. Laws, ch. 8, § 6; 1962 N. Y. Laws, ch. 209, § 6. Resort need not be had to a dictionary or case law to recognize the language of contract. The States explicitly bound themselves in a covenant not to take certain actions now or in the future, and the intent to make a contract was, as a result, not even contested in that case. Indeed, the Court found that the States had drafted this language in an effort to invoke the constitutional protections of the Contract Clause as security against repeal.

To the contrary, here the statute does not contain a provision in which the United States "covenant[s] and agree[s]" with anyone to do anything, and in fact the United States expressly declined to offer assurances about future activity when it reserved the right to revoke or repeal the Act. We therefore are not persuaded by the railroads' proffered analogy.

Because neither the language of the statute nor the circumstances surrounding its passage manifest any intent on the part of Congress to bind itself contractually to the railroads, we hold that the RPSA does not constitute a binding obligation of Congress.

B

We turn next to consider whether the Basic Agreements into which the railroads entered with Amtrak grant the railroads a contractual right *against the United States* to be free from all obligation to provide passenger service. While there can be no doubt that the Basic Agreements are contracts, they are contracts not between the railroads and the United States but simply between the railroads and the nongovernmental corporation, Amtrak. The United States was not a party to the Basic Agreements; by their terms, the agreements do not implicate the United States. The railroads do not point to any language in the RPSA authorizing Amtrak to bargain away any portion of Congress' Commerce Clause power, or to act as the Government's agent and confer upon the railroads the right to be free of any obligation to provide passenger service, assuming even that Congress could make that delegation. The District Court asserted that the Agreements might constitute contracts between the United States and the railroads because they granted the railroads relief from their passenger service obligations, and because only the United States actually could grant such relief. 577 F. Supp., at 1051. But a careful reading of the RPSA indicates that the Act, and not the Basic Agreements, actually removed that responsibility. Accordingly, we find unpersuasive the railroads' efforts to demonstrate that the United States is contractually bound, either through the RPSA or the Basic Agreements, not to reimpose any rail passenger service obligations.

Because, as we have demonstrated, neither the Act nor the Basic Agreements created a contract between railroads and the United States, our focus shifts from a case in which we confront an alleged impairment, by the Government, of its own contractual obligations, to one in which we face an alleged legislative impairment of a private contractual right. We therefore have no need to consider whether an allegation of a governmental breach of its own contract warrants application of the more rigorous standard of review that the railroads urge us to apply.[24] Instead, we turn to consider

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[24] This Court once observed:

"There is a clear distinction between the power of the Congress to control or interdict the contracts of private parties when they interfere with the exercise of its constitutional authority, and the power of the Congress to alter or repudiate the substance of its own engagements . . . . To say that the Congress may withdraw or ignore that pledge is to assume that the Constitution contemplates a vain promise, a pledge having no other sanction than the pleasure and convenience of the pledgor. This Court has whether the payment obligation in § 405(f) of the Act unconstitutionally impairs the private contractual rights of the railroads.

C

To prevail on a claim that federal economic legislation unconstitutionally impairs a private contractual right, the party complaining of unconstitutionality has the burden of demonstrating, first, that the statute alters contractual rights or obligations. See *United States Trust Co.* v. *New Jersey,* 431 U. S., at 17–21. If an impairment is found, the reviewing court next determines whether the impairment is of constitutional dimension. If the alteration of contractual obligations is minimal, the inquiry may end at this stage, *Allied Structural Steel Co.* v. *Spannaus,* 438 U. S. 234, 245 (1978); if the impairment is substantial, a court must look more closely at the legislation, *ibid.;* see also *Energy Reserves Group, Inc.,* 459 U. S., at 411. When the contract is a private one, and when the impairing statute is a federal one, this next inquiry is especially limited, and the judicial scrutiny quite minimal. The party asserting a Fifth Amendment due process violation must overcome a presumption of constitutionality and "'establish that the legislature has acted in an arbitrary and irrational way.'" *Pension Benefit Guaranty Corporation* v. *R. A. Gray & Co.,* 467 U. S. 717, 729 (1984) (quoting *Usery* v. *Turner Elkhorn Mining Co.,* 428 U. S., at 15).[25]

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given no sanction to such a conception of the obligations of our Government." *Perry* v. *United States,* 294 U. S. 330, 350–351 (1935).

Thus, the Court has observed that in order to maintain the credit of public debtors, see *Lynch* v. *United States,* 292 U. S. 571, 580 (1934), and because the "State's self-interest is at stake," *United States Trust Co.* v. *New Jersey,* 431 U. S. 1, 26 (1977), the Government's impairment of its own obligations perhaps should be treated differently. See also *Allied Structural Steel Corp.* v. *Spannaus,* 438 U. S. 234, 244, n. 15 (1978). It is clear that, where the Government is not a party to the contract at issue, these concerns are not implicated, and there is no reason to argue for a heightened standard of review.

[25] When the court reviews state economic legislation the inquiry will not necessarily be the same. As we made clear in *Pension Benefit Guar-*

The starting point for our inquiry is therefore whether the 1979 and 1981 pass-rider amendments impaired the private contractual rights that the railroads obtained under the Basic Agreements.[26] We must first consider what rights vested in the railroads pursuant to the Basic Agreements and then examine the way in which the 1979 and 1981 amendments altered those rights.[27]

The only right that the railroads obtained under the Basic Agreements was the right to be relieved of the pre-existing responsibilities they had as regulated common carriers. The RPSA expressly permitted the railroads to divest themselves of, and authorized Amtrak to assume, all the railroads' "responsibilities as a common carrier of passengers by rail in intercity rail passenger service *under [Subtitle IV of Title 49] or any State or other law relating to the provision of intercity rail passenger service.*" 45 U. S. C. § 561(a)(1) (1970 ed.) (emphasis added). In turn, the Basic Agreements relieved the railroads of their "entire responsibility for the provision of Intercity Rail Passenger Service." § 2.1, App. 13. Thus the statute and the Basic Agreements together relieved the

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anty Corporation v. *R. A. Gray & Co.*, 467 U. S., at 732–733, we have never held that the principles embodied in the Fifth Amendment's due process guarantee are coextensive with the prohibitions against state impairment of contracts under the Contract Clause, and, we observed, to the extent the standards differ, a less searching inquiry occurs in the review of federal economic legislation. See also n. 24, *supra* (discussing the standard for reviewing claims of a government's impairment of its own contractual obligations).

[26] We address first the 1979 and 1981 amendments, the issue raised on appeal, and postpone to Part III discussion of the 1972 amendment, the issue raised on cross-appeal.

[27] The RPSA established that contracts entered into by the corporation would be governed by the law of the District of Columbia. In the District of Columbia, courts determine as a matter of law whether a contract or its provisions are ambiguous—that is, whether they are reasonably susceptible of different interpretations. *Kass* v. *William Norwitz Co.*, 509 F. Supp. 618, 623–624 (DC 1980). The Court of Appeals ruled that the Basic Agreement was not ambiguous. 723 F. 2d, at 1301. As the following analysis makes clear, we agree.

railroads only of common carriage responsibilities they had by virtue of federal or state law. Moreover, Amtrak had no independent authority to relieve the railroads of obligations imposed by Congress, and it is readily apparent that Congress limited its relief to the previously imposed obligation to operate intercity rail passenger trains.

The railroads do not and could not allege that as common carriers they ever had the responsibility, by statute or regulation, to provide free passes or reduced fares for their employees and their dependents. Here, as in the lower courts, they describe the provision of passes as a "gratuitous undertaking, like providing a 'Christmas turkey.'" 577 F. Supp., at 1051. It plainly is not consistent with the nature of relief provided the railroads under the Basic Agreements to include, within the scope of the contract, relief from the "gratuitous undertakings" of providing free and reduced-fare passes. Nor did the provision of free or half-fare passes become a "responsibility" within the meaning of the statute because some railroads, although not the parties here, did not simply offer the passes as noncontractual fringe benefits, but instead were required to provide passes pursuant to their collective-bargaining agreements. The Basic Agreements did not purport to relieve the railroads of their employee obligations under collective-bargaining agreements, and in fact the Act expressly required the railroads to continue to assume their responsibilities under collective-bargaining agreements. 45 U. S. C. § 565(b) (1970 ed.) (a railroad shall make provision for "the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) to such employees under existing collective-bargaining agreements").

We therefore find that the Basic Agreements in no respect relieved the railroads of the "responsibility" to provide their employees with pass privileges, for no state or federal law imposed that "responsibility" on them, in connection with intercity rail passenger operations, when the contracts were executed. The Basic Agreements did not address this payment obligation but instead left the reimbursement issue completely open. It was not until after the Basic Agreements were signed, and Amtrak operations were under way, that Congress decided to impose new obligations on both parties to the agreements. We therefore conclude that §405(f) in no respect altered, substantially or otherwise, the railroads' existing contractual rights and duties.

D

The Court of Appeals concluded that, while the Basic Agreements might not expressly have relieved the railroads of the obligation to reimburse Amtrak for pass riders, they did relieve the railroads of all responsibility—both operational and financial—for intercity rail passenger service. 723 F. 2d, at 1302. But because the railroads were required by the 1979 and 1981 amendments to pay Amtrak more than its incremental costs, the court reasoned that some portion of the railroads' payments might go to cover Amtrak's operational expenses. In that way, the railroads would indirectly be providing the rail passenger service from which they were to have been contractually freed, and Congress' decision to require such payments might therefore violate the railroads' contractual right to be free of the responsibility to provide intercity rail service. The court then considered whether the impairment was unconstitutional and concluded that *Amtrak* had failed to meet *its* burden of proving that the amendments were "paramount to the rights of the railroads under the basic agreement." *Id.*, at 1303. The court held that the 1979 and 1981 amendments "unreasonably and illegally" impaired the rights of the railroads under the Basic Agreements by indirectly requiring the railroads to help Amtrak finance aspects of its operations that once were part of the railroads' responsibility. *Ibid.*

Initially, it is far from evident that the railroads have a private contractual right to be free from all obligations to make financial payments to subsidize Amtrak, which is the way in which the railroads view any payments in excess of Amtrak's incremental costs. The railroads were unambiguously relieved only of burdensome intercity rail responsibilities imposed by the federal and state common carrier regulatory schemes. But even if the Basic Agreements relieved the railroads of the obligation to subsidize Amtrak, they surely did not exempt the railroads from financial obligations to Amtrak of other kinds, and the railroads misdirect their attack when they assert a right to be free from subsidizing Amtrak. The issue in these cases is not whether the railroads have a right against subsidizing Amtrak, for here Congress has simply required the railroads to pay for the value of a benefit their employees receive from Amtrak. Nothing in the Basic Agreements lifted from the railroads the responsibility to pay Amtrak for the pass-rider privileges it accords their employees, and nothing gave the railroads a right to special privileges in the pricing of Amtrak services. Whether at some point the amount the railroads are required to pay might be so unreasonably high as to constitute a subsidy we need not decide, for as we demonstrate *infra* Congress acted rationally in setting the value of the pass to the employees. We therefore disagree with the Court of Appeals' conclusion that Congress impaired a private contractual right simply by passing amendments that required the railroads to pay for a service rendered. Having reached this conclusion, we of course need not consider whether the impairment is substantial.

Even were the Court of Appeals correct that the railroads have a private contractual right not to pay more than the incremental cost of the passes, we disagree with the Court of Appeals' conclusion that the Due Process Clause limited Congress' power to choose a different reimbursement scheme in these cases. Under the Fifth Amendment's Due Process Clause, Congress remained free to "'adjus[t] the burdens and benefits of economic life,'" as long as it did so in a manner that was neither arbitrary nor irrational. *Pension Benefit Guaranty Corporation* v. *R. A. Gray & Co.*, 467 U. S., at 729 (quoting *Usery* v. *Turner Elkhorn Mining Co.*, 428 U. S., at 15). Moroever, in the determination of whether economic legislation that substantially alters contractual rights and duties violates due process, the burden of proving irrationality rests squarely on the party asserting a due process violation. 467 U. S., at 729. When it performed this due process inquiry, the court below erred both in placing the burden of proof on Amtrak to defend the legislation and in defining the standard of review as rigorously as it did.

Had it applied the correct standard, the Court of Appeals would have found that the railroads have not met their burden of proof. In passing § 405(f), Congress rationally required Amtrak to honor the expectations of the railroads' past and present employees and their dependents. It rationally took this step to maintain employee morale and labor peace, and it rationally required the railroads to pay at least a portion of the cost of the privileges, both because the railroads, rather than the taxpayers, were responsible for the creation of the moral obligation to the railroad employees and retirees, and because the railroads benefited from labor peace and continued employee morale.

Similarly, after reasonably requiring the railroads to reimburse Amtrak for benefits received, Congress acted wholly rationally in selecting the value to the passholders—as opposed to the cost to Amtrak—as the proper reimbursement amount, and in settling on the 25-percent figure to quantify the value received. It commissioned a study by the GAO, which concluded that several different computations of cost made sense, and that the selection of no one cost-spreading scheme was more inherently rational or fair than any other. App. 80–81. At this point, the decision was uniquely one for Congress, which had absolutely no obligation to select the scheme that a court later would find to be the fairest, but simply one that was rational and not arbitrary. Congress placed a value on the free passes that reasonably relates to the normal fares of the public, and "[w]e are unwilling to assess the wisdom of Congress' chosen scheme . . . . It is enough to say that the Act approaches the problem of cost spreading rationally; whether a [different] cost-spreading scheme would have been wiser or more practical under the circumstances is not a question of constitutional dimension." *Turner Elkhorn*, *supra*, at 18–19. We therefore conclude that the 1979 and 1981 amendments in no respect offend the Due Process Clause.

Having concluded that the Basic Agreements relieved the railroads only of the direct and onerous responsibilities they had borne as common carriers, and having further concluded that the provision of free and partial-fare passes was not among those responsibilities, we conclude that the 1979 and 1981 amendments to the Act did not impair private contractual rights acquired by the railroads as parties to the Basic Agreements. The amendments imposed new obligations on the railroads and in no respect infringed the railroads' existing contractual rights. But even if the payment of more than the incremental cost of pass privileges indirectly subsidizes Amtrak operations in violation of a private contractual right, Congress' decision to assess the railroads is rational and reasoned, and the railroads have failed to demonstrate a due process violation. We therefore reverse the Court of Appeals insofar as it ruled to the contrary.

III

The foregoing analysis *a fortiori* requires us to reject the railroads' argument on cross-appeal that they have a contractual right to be free from the obligation to make any payments to Amtrak, even for incremental costs. Absolutely nothing in the RPSA or the Basic Agreements suggests that the railroads were relieved of the responsibility to reimburse Amtrak for the costs of providing to the railroads' employees and retirees, and their dependents, the free passes that the railroads had traditionally provided to them.

IV

Accordingly we hold that § 405(f) of the RPSA is constitutional, and we reverse the Court of Appeals insofar as it held that the 1979 and 1981 amendments to the Act contravened the Due Process Clause.

It is so ordered.

JUSTICE POWELL took no part in the decision of these cases.

FEDERAL ELECTION COMMISSION *v.* NATIONAL CONSERVATIVE POLITICAL ACTION COMMITTEE ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 83-1032. Argued November 28, 1984—Decided March 18, 1985*

The Presidential Election Campaign Fund Act (Fund Act) offers the Presidential candidates of major political parties the option of receiving public financing for their general election campaigns. If the candidate elects public financing, the Act, in 26 U. S. C. § 9012(f), makes it a criminal offense for an independent "political committee" to expend more than $1,000 to further that candidate's election. Believing that §9012(f) would prohibit appellee independent political committees' intended substantial expenditures in support of President Reagan's reelection in 1984, appellant Democratic Party and appellant Democratic National Committee (Democrats) filed an action in Federal District Court against appellees, seeking a declaration that §9012(f) is constitutional. Appellant Federal Election Commission (FEC) brought a separate action against the same defendants seeking the same relief, and the two actions were consolidated. The District Court held that the Democrats had standing under 26 U. S. C. § 9011(b)(1)—which authorizes the FEC, "the national committee of any political party, and individuals eligible to vote for President" to institute such actions "as may be appropriate to implement or con[s]true any provisions of [the Fund Act]"—to seek the requested declaratory relief, but that the Democrats and the FEC were not entitled to a declaration that §9012(f) is constitutional. The court then held § 9012(f) unconstitutional on its face because it violated First Amendment freedoms of speech and association.

Held:

1. The Democrats lack standing under §9011(b)(1). Pp. 484-489.

(a) Contrary to the Democrats' assertion that there is no need to resolve the issue of their standing, raised in the FEC's appeal, because the FEC clearly has standing and the legal issues and relief requested are the same in both actions, this Court will decide the issue. It is squarely presented in the Democrats' appeal from the District Court's

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*Together with No. 83-1122, *Democratic Party of the United States et al.* v. *National Conservative Political Action Committee et al.*, also on appeal from the same court.

determination that §9011(b)(1) is unconstitutional, and if the District Court's decision that the Democrats have standing is allowed to stand, it could seriously interfere with the FEC's exclusive jurisdiction to determine how and when to enforce the Fund Act. Pp. 484–486.

(b) The plain language of § 9011(b)(1) and § 306(b)(1) of the Federal Election Campaign Act of 1971 (FECA)—which provides that the FEC "shall administer, seek to obtain compliance with, and formulate policy with respect to" the Fund Act and confers on the FEC "exclusive jurisdiction with respect to the civil enforcement" of the Act—clearly shows that the Democrats have no standing to bring a private action against another private party. The Democratic Party is clearly not included within those authorized by § 9011(b)(1) to bring an action. And, while the Democratic National Committee is authorized to bring an action, the action must be "appropriate" to implement or construe the provision of the Fund Act at issue. Reading § 306(b)(1) of the FECA and 26 U. S. C. § 9010(a)—which authorizes the FEC to appear in and defend against any action filed under § 9011—together with § 9011, "appropriate" actions by private parties are those that do not interfere with the FEC's responsibilities for administering and enforcing the Fund Act. Accordingly, private suits to construe or enforce the Act are inappropriate interference with those responsibilities. Pp. 486–489.

2. Section 9012(f) violates the First Amendment. Pp. 490–501.

(a) The expenditures at issue are squarely prohibited by § 9012(f). And, as producing speech at the core of the First Amendment and implicating the freedom of association, they are entitled to full protection under that Amendment. Pp. 490–496.

(b) Section 9012(f)'s limitation on independent expenditures by political committees is constitutionally infirm, absent any indication that such expenditures have a tendency to corrupt or to give the appearance of corruption. But even assuming that Congress could fairly conclude that large-scale political action committees have a sufficient tendency to corrupt, § 9012(f) is a fatally overbroad response to that evil. It is not limited to multimillion dollar war chests, but applies equally to informal discussion groups that solicit neighborhood contributions to publicize their views about a particular Presidential candidate. Pp. 496–500.

(c) Section 9012(f) cannot be upheld as a prophylactic measure deemed necessary by Congress. The groups and associations in question here, designed expressly to participate in political debate, are quite different from the traditional organizations organized for economic gain that may properly be prohibited from making contributions to political candidates. P. 500.

578 F. Supp. 797, affirmed in part and reversed in part.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, POWELL, and O'CONNOR, JJ., joined, and in Part II of which BRENNAN and STEVENS, JJ., joined. STEVENS, J., filed an opinion concurring in part and dissenting in part, *post*, p. 501. WHITE, J., filed a dissenting opinion, in Part I of which BRENNAN and MARSHALL, JJ., joined, *post*, p. 502. MARSHALL, J., filed a dissenting opinion, *post*, p. 518.

Charles N. Steele argued the cause for appellant in No. 83–1032. With him on the briefs were *Richard B. Bader, Miriam Aguiar,* and *Jonathan A. Bernstein. Steven B. Feirson* argued the cause for appellants in No. 83–1122. With him on the briefs were *John M. Coleman* and *Anthony S. Harrington.*

Robert R. Sparks, Jr., argued the cause for appellees in both cases. With him on the brief was *J. Curtis Herge.*†

JUSTICE REHNQUIST delivered the opinion of the Court.‡

The Presidential Election Campaign Fund Act (Fund Act), 26 U. S. C. § 9001 *et seq.*, offers the Presidential candidates of major political parties the option of receiving public financing for their general election campaigns. If a Presidential candidate elects public financing, § 9012(f) makes it a criminal offense for independent "political committees," such as appellees National Conservative Political Action Committee (NCPAC) and Fund For A Conservative Majority (FCM), to expend more than $1,000 to further that candidate's election. A three-judge District Court for the Eastern District of Pennsylvania, in companion lawsuits brought respectively by the Federal Election Commission (FEC) and by the Democratic Party of the United States and the Democratic National Committee (DNC), held § 9012(f) unconstitutional on its face because it violated the First Amendment to the United States Constitution. These plaintiffs challenge that determination on this appeal, and the FEC also appeals from that part of the judgment holding that the Democratic Party and the DNC have standing under 26 U. S. C. § 9011(b)(1) to seek a declaratory judgment against appellees upholding the constitutionality of § 9012(f). We noted probable jurisdiction pursuant to the statutory appeal provision of § 9011(b)(2), which provides for a direct appeal to this Court from three-judge district courts convened in proceedings under § 9011(b)(1). 466 U. S. 935 (1984). We reverse the judgment of the District Court on the issue of the standing of the Democratic Party and the DNC, but affirm its judgment as to the constitutional validity of § 9012(f).

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†Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union by *Philip A. Lacovara, Ronald A. Stern, Charles S. Sims,* and *Arthur B. Spitzer;* for the Gulf & Great Plains Legal Foundation et al. by *Wilkes C. Robinson;* and for the National Congressional Club by *Brice M. Clagett* and *John R. Bolton.*

Roger M. Witten, William T. Lake, and *Archibald Cox* filed a brief for Common Cause as *amicus curiae.*

‡JUSTICE BRENNAN joins only Part II of this opinion.

The present litigation began in May 1983 when the Democratic Party, the DNC, and Edward Mezvinsky, Chairman of the Pennsylvania Democratic State Committee, in his individual capacity as a citizen eligible to vote for President of the United States[1] (collectively, the Democrats), filed suit against NCPAC and FCM (the PACs), who had announced their intention to spend large sums of money to help bring about the reelection of President Ronald Reagan in 1984. Their amended complaint sought a declaration that § 9012(f), which they believed would prohibit the PACs' intended expenditures, was constitutional. The FEC intervened for the sole purpose of moving, along with the PACs, to dismiss the complaint for lack of standing.

In June 1983, the FEC brought a separate action against the same defendants seeking identical declaratory relief. It was referred to the same three-judge District Court, which consolidated the two cases for all purposes. The parties submitted 201 stipulations and three books of exhibits as the factual record. After extensive briefing and oral argument, the court issued a comprehensive opinion, holding that the Democrats had standing under § 9011(b)(1) and Art. III of the Constitution to seek the requested declaratory relief, but that the Democrats and the FEC were not entitled to a declaration that § 9012(f) is constitutional. 578 F. Supp. 797 (1983). The court held that § 9012(f) abridges First Amendment freedoms of speech and association, that it is substantially overbroad, and that it cannot permissibly be given a narrowing construction to cure the overbreadth. The court did not, however, declare § 9012(f) unconstitutional because the PACs had not filed a counterclaim requesting such a declaration.

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[1] Mezvinsky did not pursue an appeal in this Court, though his name was inadvertently included in the notice of appeal filed by the Democratic Party and the DNC.

I

In their respective suits, the Democrats and the FEC relied upon 26 U. S. C. § 9011(b) to confer standing on them and subject-matter jurisdiction on the three-judge District Court. Section 9011(b)(1) provides:

> "The [FEC], the national committee of any political party, and individuals eligible to vote for President are authorized to institute such actions, including actions for declaratory judgment or injunctive relief, as may be appropriate to implement or con[s]true any provisions of [the Fund Act]."

Section 9011(b)(2) confers subject-matter jurisdiction on the district courts of the United States, sitting in panels of three judges in accordance with 28 U. S. C. § 2284, to hear proceedings instituted under § 9011(b)(1).

We do not doubt, nor do any of the parties in these cases challenge, the standing of the FEC, which is specifically identified in § 9011(b)(1), to bring a declaratory action to test the constitutionality of a provision of the Fund Act. We think such an action is "appropriate" within the meaning of that section because a favorable declaration would materially advance the FEC's ability to expedite its enforcement of the

Fund Act against political committees such as NCPAC and FCM. This is especially important because the relatively short duration of the then upcoming general election campaigns for President allowed little time in which to prosecute an enforcement action before it would become moot in whole or in part. We are fortified in our conclusion by § 306(b)(1) of the Federal Election Campaign Act of 1971 (FECA), as added, 88 Stat. 1281, and amended, 2 U. S. C. § 437c(b)(1), which provides that the FEC "shall have exclusive jurisdiction with respect to the civil enforcement" of the Fund Act. Article III standing exists by virtue of the facts that the FEC and the PACs have adverse interests, the PACs threatened, and now have made, substantial expenditures in apparent contravention of 26 U. S. C. § 9012(f), and the declaratory relief the FEC requests would aid its enforcement efforts against the PACs and others similarly situated.

Despite the identity of the relief requested by the FEC and the Democrats, the FEC asks this Court to reverse the District Court's holding that the Democrats also have standing under § 9011(b)(1). The Democrats maintain that there is no need to resolve this question because there is no doubt about the standing of the FEC and the legal issues and relief requested are the same in the two cases. See *McCulloch* v. *Sociedad Nacional de Marineros de Honduras,* 372 U. S. 10, 16 (1963). The PACs have declined to renew or brief their jurisdictional challenge in this Court because in the present procedural posture they see the standing question as a "turf fight" in which they do not wish to participate.

Though *McCulloch, supra,* is authority on its somewhat different facts for finessing a decision as to questions of "jurisdiction" in one of two companion cases raising the same substantive issues, we decline to follow that course here. The statutory standing issue is squarely presented by the Democrats' appeal, and if the FEC is correct in its assertion as to lack of standing, the decision of the District Court could seriously interfere with the agency's exclusive jurisdiction to determine how and when to enforce the Act. In the present cases, for example, there is no indication that the FEC would have filed a complaint against the PACs for a declaratory judgment if the Democrats had not done so first. The FEC might have chosen to focus its resources elsewhere or to pursue an enforcement action at a later date. The Democrats forced its hand; the subject of the litigation was so central to the FEC's function that it had no choice but to intervene once the action had been commenced.

The plain language of the Fund Act and the FECA suggests quite emphatically that the Democrats do not have standing to bring a private action against another private party. In addition to the FEC, § 9011(b)(1) applies only to "the national committee of any political party" and to "individuals eligible to vote for President." Clearly the Democratic Party is not included; hence the District Court erred in permitting it to remain in the proceedings. The DNC is a national committee of a political party, and Edward Mezvinsky is an individual eligible to vote for President; therefore, they are authorized to bring actions under § 9011(b)(1). But such actions must be "appropriate to implement or construe" the provision of the Fund Act at issue. The District Court's conclusion that the language of the statute "plainly" authorizes a private suit to seek construction of § 9012(f) seems to us to ignore the word "appropriate." That word would be superfluous unless it restricts standing to suits which are "appropriate" in light of the statutory scheme for interpreting and enforcing the Act.

This scheme seems simple enough. Title 2 U. S. C. § 437c(b)(1) provides that the FEC "shall administer, seek to obtain compliance with, and formulate policy with respect to" the Fund Act and confers on the FEC "exclusive jurisdiction with respect to the civil enforcement of" the Act. Title 26 U. S. C. § 9010(a) authorizes the FEC "to appear in and defend against any action filed under section 9011." Reading these two provisions together with § 9011, "appropriate" actions by private parties are actions that do not interfere with the FEC's responsibilities for administering and enforcing the Act. Common sense indicates that only one body can intelligently formulate the policy necessary to administer an Act of this kind. The decision to sue third parties to construe or enforce the Act falls within these functions. Accordingly, private suits of this kind are inappropriate interference with the FEC's responsibilities.

Consistent with this statutory scheme an "appropriate" role for private parties under § 9011(b)(1) would be to bring suits against the FEC to challenge its interpretations of various provisions of the Act. For example, the defendant PACs might have instituted an action challenging the FEC's interpretation of § 9012(f) to cover the type of independent expenditures they planned to make. The specific authorization in the adjacent § 9010(a) for the FEC to appear in and defend actions under § 9011 implies that Congress contemplated that private suits pursuant to the latter section would be directed at the FEC. Lest one ask why the FEC is also given standing under § 9011(b)(1), the obvious answer would be to give it the benefit of a three-judge district court and direct appeal to this Court under § 9011(b)(2), which procedures are not available in ordinary § 437c(b)(1) enforcement actions. See 2 U. S. C. §§ 437g(a)(6), (10).

This interpretation makes a good deal of sense. Suits to construe the Fund Act and to bring about implementation of the Act—presumably implementation by the FEC, which has exclusive authority to administer and enforce the Act—raise issues that are likely to be of great importance and in Congress' judgment justify a three-judge court, expedited review, and direct appeal to this Court. Ordinary enforcement actions to obtain compliance with the terms of the Act after they have been construed and implemented would not justify such extraordinary procedures. Moreover, it seems highly dubious that Congress intended every one of the millions of eligible voters in this country to have the power to invoke expedited review by a three-judge district court with direct appeal to this Court in actions brought by them against other private parties. The DNC is obviously not just another private litigant, and it would undoubtedly be a worthy representative of collective interests which would justify expedited review had Congress so provided; but Congress simply did not draft the statute in a way that distinguishes the DNC from any individual voter.

Consistent with FEC's supervisory role, Congress provided an administrative complaint procedure in 2 U. S. C. § 437g, through which the Democrats could have pursued their dispute with the PACs. The Democrats could have filed a complaint expressing their belief that "a violation [of the Fund Act] ha[d] occurred" based on the PACs' independent expenditures in the 1980 Presidential election. § 437g(a)(1). If the FEC, "upon receiving a complaint . . . or on the basis of information ascertained in the normal course of carrying out its supervisory responsibilities, determines . . . that it has reason to believe that a person has committed, or is about to commit, a violation [of the Fund Act]," § 437g(a)(2), it is obligated to investigate and, if it finds "probable cause to believe that any person has committed, or is about to commit, a violation," to pursue various corrective and enforcement steps, which can ultimately involve civil and criminal proceedings in district court.

If the FEC dismissed the complaint or failed to act on it in 120 days, the Democrats could petition the District Court for the District of Columbia under § 437g(a)(8) for a declaration that the FEC had acted contrary to law and for an order directing the FEC to pursue the complaint. If, and only if, the FEC failed to obey such an order, could the Democrats bring a civil action directly against the PACs to remedy the violation charged in their complaint.

Alternatively, the DNC or an individual voter could sue the FEC under 26 U. S. C. § 9011(b) to implement or construe the Act. This avenue, of course, is available to the

Democrats without first pursuing or exhausting the § 437g administrative complaint procedure, see § 9011(b)(2), but it would be worth pursuing only if the disagreement between the litigant and the FEC were over a matter of implementation or construction, and not routine enforcement. However, that is a judgment Congress made in establishing the statutory scheme.

We do not necessarily reject the District Court's conclusion that the legislative history of the successive amendments to § 437c(b)(1) indicates an intention by the word "exclusive" to centralize in one agency the civil enforcement responsibilities previously fragmented among various governmental agencies. But nowhere is there any indication that Congress previously expressed any intention that anyone other than Government agencies have enforcement responsibilities. Section 9011(b) certainly is not a source of general private "enforcement" authority, as that word is conspicuously absent from § 9011(b), which speaks only of suits to "implement or construe."[2] We also do not believe that an intention to create a so-called "maximum enforcement regime," calling for both Government and private enforcement, can be inferred from the fact that other congressional Acts, such as the Surface Mining Control and Reclamation Act of 1977, 30 U. S. C. § 1270, the Energy Policy and Conservation Act, 42 U. S. C. § 6305, and the Clean Air Act, 42 U. S. C. § 7604, expressly adopt such an enforcement scheme. Nor may it be inferred from the fact that the related FECA has a different enforcement scheme than the Fund Act. Compare 2 U. S. C. § 437d(e) and 26 U. S. C. § 9011(b). Such speculative inferences do not carry the day in the face of the contrary language of the Fund Act.

In view of our conclusion that the Democrats lack standing under the statute, there is no need to reach the Art. III issue decided by the District Court. Therefore, we turn to the merits of the FEC's appeal of its unsuccessful declaratory judgment action against the PACs.

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[2] The Democrats implicitly conceded as much by amending their complaint to delete their initial request for injunctive relief.

II

NCPAC is a nonprofit, nonmembership corporation formed under the District of Columbia Nonprofit Corporation Act in August 1975 and registered with the FEC as a political committee. Its primary purpose is to attempt to influence directly or indirectly the election or defeat of candidates for federal, state, and local offices by making contributions and by making its own expenditures. It is governed by a three-member board of directors which is elected annually by the existing board. The board's chairman and the other two members make all decisions concerning which candidates to support or oppose, the strategy and methods to employ, and the amounts of money to spend. Its contributors have no role in these decisions. It raises money by general and specific direct mail solicitations. It does not maintain separate accounts for the receipts from its general and specific solicitations, nor is it required by law to do so.

FCM is incorporated under the laws of Virginia and is registered with the FEC as a multicandidate political committee. In all material respects it is identical to NCPAC.

Both NCPAC and FCM are self-described ideological organizations with a conservative political philosophy. They solicited funds in support of President Reagan's 1980 campaign, and they spent money on such means as radio and television advertisements to encourage voters to elect him President. On the record before us, these expenditures were "independent" in that they were not made at the request of or in coordination with the official Reagan election campaign committee or any of its agents. Indeed, there are indications that the efforts of these organizations were at times viewed with disfavor by the official campaign as counterproductive to its chosen strategy. NCPAC and FCM expressed their intention to conduct similar activities in support of President

Reagan's reelection in 1984, and we may assume that they did so.

As noted above, both the Fund Act and FECA play a part in regulating Presidential campaigns. The Fund Act comes into play only if a candidate chooses to accept public funding of his general election campaign, and it covers only the period between the nominating convention and 30 days after the general election. In contrast, FECA applies to all Presidential campaigns, as well as other federal elections, regardless of whether publicly or privately funded. Important provisions of these Acts have already been reviewed by this Court in *Buckley* v. *Valeo*, 424 U. S. 1 (1976). Generally, in that case we upheld as constitutional the limitations on *contributions to candidates* and struck down as unconstitutional *limitations on independent expenditures.*[3]

In these cases we consider provisions of the Fund Act that make it a criminal offense for political committees such as NCPAC and FCM to make independent expenditures in support of a candidate who has elected to accept public financing. Specifically, § 9012(f) provides:

> "(1) . . . it shall be unlawful for any political committee which is not an authorized committee with respect to the eligible candidates of a political party for President and Vice President in a presidential election knowingly and willfully to incur expenditures to further the election of such candidates, which would constitute qualified campaign expenses if incurred by an authorized committee of such candidates, in an aggregate amount exceeding $1,000."

The term "political committee" is defined to mean "any committee, association, or organization (whether or not incorporated) which accepts contributions or makes expenditures for the purpose of influencing, or attempting to influence, the nomination or election of one or more individuals to Federal, State, or local elective public office." 26 U. S. C. § 9002(9). The term "qualified campaign expense" simply means an otherwise lawful expense by a candidate or his authorized committee "to further his election" incurred during the period between the candidate's nomination and 30 days after election day. §§ 9002(11), 9002(12). The term "eligible candidates" means those Presidential and Vice Presidential candidates who are qualified under the Act to receive public funding and have chosen to do so. §§ 9002(4), 9003. Two of the more important qualifications are that a candidate and his authorized committees not incur campaign expenses in excess of his public funding and not accept contributions to defray campaign expenses. §§ 9003(b), 9012(b).

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[3] In *Buckley*, THE CHIEF JUSTICE and JUSTICE BLACKMUN would have struck down the limitations on contributions along with the limitations on independent expenditures. JUSTICE WHITE would have upheld both limitations.

There is no question that NCPAC and FCM are political committees and that President Reagan was a qualified candidate, and it seems plain enough that the PACs' expenditures fall within the term "qualified campaign expense." The PACs have argued in this Court, though apparently not below, that § 9012(f) was not intended to cover truly independent expenditures such as theirs, but only coordinated expenditures. But "expenditures in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents," are considered "contributions" under the FECA, 2 U. S. C. § 441a(a)(7)(B)(i), and as such are already subject to FECA's $1,000 and $5,000 limitations in §§ 441a(a)(1), (2). Also, as noted above, one of the requirements for public funding is the candidate's agreement not to accept such contributions. Under the PACs' construction, § 9012(f) would be wholly superfluous, and we find no support for that construction in the legislative history. We conclude that the PACs' independent expenditures at issue in this case are squarely prohibited by § 9012(f), and we proceed to consider whether that prohibition violates the First Amendment.

There can be no doubt that the expenditures at issue in this case produce speech at the core of the First Amendment. We said in *Buckley* v. *Valeo, supra,* at 14:

> "The Act's contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities. Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' *Roth* v. *United States*, 354 U. S. 476, 484 (1957). . . . This no more than reflects our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,' *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 270 (1964)."

The PACs in this case, of course, are not lone pamphleteers or street corner orators in the Tom Paine mold; they spend substantial amounts of money in order to communicate their political ideas through sophisticated media advertisements. And of course the criminal sanction in question is applied to the expenditure of money to propagate political views, rather than to the propagation of those views unaccompanied by the expenditure of money. But for purposes of presenting political views in connection with a nationwide Presidential election, allowing the presentation of views while forbidding the expenditure of more than $1,000 to present them is much like allowing a speaker in a public hall to express his views while denying him the use of an amplifying system. The Court said in *Buckley* v. *Valeo, supra:*

> "A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expres-

> sion by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech." 424 U. S., at 19.

We also reject the notion that the PACs' form of organization or method of solicitation diminishes their entitlement to First Amendment protection. The First Amendment freedom of association is squarely implicated in these cases. NCPAC and FCM are mechanisms by which large numbers of individuals of modest means can join together in organizations which serve to "amplif[y] the voice of their adherents." *Buckley* v. *Valeo*, 424 U. S., at 22; *NAACP* v. *Alabama*, 357 U. S. 449, 460 (1958); *Citizens Against Rent Control* v. *Berkeley*, 454 U. S. 290, 295–296 (1981). It is significant that in 1979–1980 approximately 101,000 people contributed an average of $75 each to NCPAC and in 1980 approximately 100,000 people contributed an average of $25 each to FCM.

The FEC urges that these contributions do not constitute individual speech, but merely "speech by proxy," see *California Medical Assn.* v. *FEC*, 453 U. S. 182, 196 (1981) (MARSHALL, J.) (plurality opinion), because the contributors do not control or decide upon the use of the funds by the PACs or the specific content of the PACs' advertisements and other speech. The plurality emphasized in that case, however, that nothing in the statutory provision in question "limits the amount [an unincorporated association] or any of its members may independently expend in order to advocate political views," but only the amount it may contribute to a multicandidate political committee. *Id.*, at 195. Unlike *California Medical Assn.*, the present cases involve limitations on expenditures by PACs, not on the contributions they receive; and in any event these contributions are predominantly small and thus do not raise the same concerns as the sizable contributions involved in *California Medical Assn.*

Another reason the "proxy speech" approach is not useful in this case is that the contributors obviously like the message they are hearing from these organizations and want to add their voices to that message; otherwise they would not part with their money. To say that their collective action in pooling their resources to amplify their voices is not entitled to full First Amendment protection would subordinate the voices of those of modest means as opposed to those sufficiently wealthy to be able to buy expensive media ads with their own resources.

Our decision in *FEC* v. *National Right to Work Committee*, 459 U. S. 197 (1982) *(NRWC)*, is not to the contrary. That case turned on the special treatment historically accorded corporations. In return for the special advantages that the State confers on the corporate form, individuals acting jointly through corporations forgo some of the rights they have as individuals. *Id.*, at 209–210. We held in *NRWC* that a rather intricate provision of the FECA dealing with the prohibition of corporate campaign contributions to political candidates did not violate the First Amendment. The prohibition excepted corporate solicitation of contributions to a segregated fund established for the purpose of contributing to candidates, but in turn limited such solicitations to stockholders or members of a corporation without capital stock. We upheld this limitation on solicitation of contributions as applied to the National Right to Work Committee, a corporation without capital stock, in view of the well-established constitutional validity of legislative regulation of corporate contributions to candidates for public office. *NRWC* is consistent with this Court's earlier holding that a corporation's expenditures to propagate its views on issues of general public interest are of a different constitutional stature than corporate contributions to candidates. *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 789–790 (1978). In *Bellotti*, of course, we did not reach, nor do we need to reach in these cases, the question whether a corporation can constitutionally be restricted in making independent expenditures to influence elections for public office. *Id.*, at 788, n. 26.

Like the National Right to Work Committee, NCPAC and FCM are also formally incorporated; however, these are not "corporations" cases because § 9012(f) applies not just to corporations but to any "committee, association, or organization (whether or not incorporated)" that accepts contributions or makes expenditures in connection with electoral campaigns. The terms of § 9012(f)'s prohibition apply equally to an informal neighborhood group that solicits contributions and spends money on a Presidential election as to the wealthy and professionally managed PACs involved in these cases. See *Citizens Against Rent Control* v. *Berkeley*, *supra*, at 300 (REHNQUIST, J., concurring).

Having concluded that the PACs' expenditures are entitled to full First Amendment protection, we now look to see if there is a sufficiently strong governmental interest served by § 9012(f)'s restriction on them and whether the section is narrowly tailored to the evil that may legitimately be regulated. The restriction involved here is not merely an effort by the Government to regulate the use of its own property, such as was involved in *United States Postal Service* v. *Greenburgh Civic Assns.*, 453 U. S. 114 (1981), or the dismissal of a speaker from Government employment, such as was involved in *Connick* v. *Myers*, 461 U. S. 138 (1983). It is a flat, across-the-board criminal sanction applicable to any "committee, association, or organization" which spends more than $1,000 on this particular type of political speech.

We held in *Buckley* and reaffirmed in *Citizens Against Rent Control* that preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances. In *Buckley* we struck down the FECA's limitation on individuals' independent expenditures because we found no tendency in such expenditures, uncoordinated with the candidate or his campaign, to corrupt or to give the appearance of corruption. For similar reasons, we also find § 9012(f)'s limitation on independent expenditures by political committees to be constitutionally infirm.

Corruption is a subversion of the political process. Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns. The hallmark of corruption is the financial *quid pro quo:* dollars for political favors. But here the conduct proscribed is not contributions to the candidate, but independent expenditures in support of the candidate. The amounts given to the PACs are overwhelmingly small contributions, well under the $1,000 limit on contributions upheld in *Buckley;* and the contributions are by definition not coordinated with the campaign of the candidate. The Court concluded in *Buckley* that there was a fundamental constitutional difference between money spent to advertise one's views independently of the candidate's campaign and money contributed to the candidate to be spent on his campaign. We said there:

> "Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." 424 U. S., at 47.

We think the same conclusion must follow here. It is contended that, because the PACs may by the breadth of their organizations spend larger amounts than the individuals in

Buckley, the potential for corruption is greater. But precisely what the "corruption" may consist of we are never told with assurance. The fact that candidates and elected officials may alter or reaffirm their own positions on issues in response to political messages paid for by the PACs can hardly be called corruption, for one of the essential features of democracy is the presentation to the electorate of varying points of view. It is of course hypothetically possible here, as in the case of the independent expenditures forbidden in *Buckley*, that candidates may take notice of and reward those responsible for PAC expenditures by giving official favors to the latter in exchange for the supporting messages. But here, as in *Buckley*, the absence of prearrangement and coordination undermines the value of the expenditure to the candidate, and thereby alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate. On this record, such an exchange of political favors for uncoordinated expenditures remains a hypothetical possibility and nothing more.

Even were we to determine that the large pooling of financial resources by NCPAC and FCM did pose a potential for corruption or the appearance of corruption, § 9012(f) is a fatally overbroad response to that evil. It is not limited to multimillion dollar war chests; its terms apply equally to informal discussion groups that solicit neighborhood contributions to publicize their views about a particular Presidential candidate.

Several reasons suggest that we are not free to adopt a limiting construction that might isolate wealthy PACs, even if such a construction might save the statute. First, Congress plainly intended to prohibit just what § 9012(f) prohibits—independent expenditures over $1,000 by all political committees, large and small. Even if it did not intend to cover small neighborhood groups, there is also no evidence in the statute or the legislative history that it would have looked favorably upon a construction of the statute limiting § 9012(f) only to very successful PACs. Secondly, we cannot distinguish in principle between a PAC that has solicited 1,000 $25 contributions and one that has solicited 100,000 $25 contributions. Finally, it has been suggested that § 9012(f) could be narrowed by limiting its prohibition to political committees in which the contributors have no voice in the use to which the contributions are put. Again, there is no indication in the statute or the legislative history that Congress would be content with such a construction. More importantly, as observed by the District Court, such a construction is intolerably vague. At what point, for example, does a neighborhood group that solicits some outside contributions fall within § 9012(f)? How active do the group members have to be in setting policy to satisfy the control test? Moreover, it is doubtful that the members of a large association in which each have a vote on policy have substantially more control in practice than the contributors to NCPAC and FCM: the latter will surely cease contributing when the message those organizations deliver ceases to please them.

In the District Court, the FEC attempted to show actual corruption or the appearance of corruption by offering evidence of high-level appointments in the Reagan administration of persons connected with the PACs and newspaper articles and polls purportedly showing a public perception of corruption. The District Court excluded most of the proffered evidence as irrelevant to the critical elements to be proved: corruption of candidates or public perception of corruption of candidates. A tendency to demonstrate distrust of PACs is not sufficient. We think the District Court's finding that "the evidence supporting an adjudicative finding of corruption or its appearance is evanescent," 587 F. Supp., at 830, was clearly within its discretion, and we will not disturb it here. If the matter offered by the FEC in the District Court be treated as addressed to what the District Court referred to as "legislative facts," we nonetheless agree with the District Court that the evidence falls far short of being adequate for this purpose.

Finally, the FEC urges us to uphold § 9012(f) as a prophylactic measure deemed necessary by Congress, which has far more expertise than the Judiciary in campaign finance and corrupting influences. In *NRWC*, 459 U. S., at 210, we stated:

> "While [2 U. S. C.] § 441b restricts the solicitation of corporations and labor unions without great financial resources, as well as those more fortunately situated, we accept Congress' judgment that it is the potential for such influence that demands regulation. Nor will we second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared."

Here, however, the groups and associations in question, designed expressly to participate in political debate, are quite different from the traditional corporations organized for economic gain. In *NRWC* we rightly concluded that Congress might include, along with labor unions and corporations traditionally prohibited from making contributions to political candidates, membership corporations, though contributions by the latter might not exhibit all of the evil that contributions by traditional economically organized corporations exhibit. But this proper deference to a congressional determination of the need for a prophylactic rule where the evil of potential corruption had long been recognized does not suffice to establish the validity of § 9012(f), which indiscriminately lumps with corporations any "committee, association or organization." Indeed, the FEC in its briefs to this Court does not even make an effort to defend the statute under a construction limited in reach to corporations.

While in *NRWC* we held that the compelling governmental interest in preventing corruption supported the restriction of the influence of political war chests funneled through the corporate form, in the present cases we do not believe that a similar finding is supportable: when the First Amendment is involved, our standard of review is "rigorous," *Buckley* v. *Valeo,* 424 U. S., at 29, and the effort to link either corruption or the appearance of corruption to independent expenditures by PACs, whether large or small, simply does not pass this standard of review. Even assuming that Congress could fairly conclude that large-scale PACs have a sufficient tendency to corrupt, the overbreadth of § 9012(f) in these cases is so great that the section may not be upheld. We are not quibbling over fine-tuning of prophylactic limitations, but are concerned about wholesale restriction of clearly protected conduct. See *Broadrick* v. *Oklahoma,* 413 U. S. 601 (1973).

The judgment of the District Court is affirmed as to the constitutionality of § 9012(f), but is reversed on the issue of the Democrats' standing, with instructions to dismiss their complaint for lack of standing.

It is so ordered.

JUSTICE STEVENS, concurring in part and dissenting in part.

As I read it, the plain language of 26 U. S. C. § 9011(b)(1) confers standing on the Democratic National Committee. The fact that the Federal Election Commission also has standing is not, in my opinion, a sufficient reason for concluding that it was not appropriate for DNC to commence this action regardless of whether or not the FEC elected to participate. This, however, is just my tentative opinion because it really is not necessary to decide the issue discussed in Part I of the Court's opinion in view of the fact that the disposition of the appeal in No. 83–1122 is controlled by our decision in No. 83–1032. *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U. S. 10, 16 (1963).

Accordingly, I join only Part II of the Court's opinion.

JUSTICE WHITE, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join as to Part I, dissenting.

I

Section 9011(b)(1) of the Internal Revenue Code authorizes the Federal Election Commission (FEC), "the national committee of any political party, and individuals eligible to vote for President" to institute actions "to implement or construe" the Fund Act. Relying on this provision, both the FEC and the Democratic National Committee (DNC) brought suit to enjoin expenditures by appellees that violated § 9012(f). Despite the identity of the issues raised and the relief sought by the plaintiffs, the majority holds that only the FEC properly invoked the jurisdiction of the District Court because only its action is "appropriate." I disagree.

A

By its plain terms, § 9011(b)(1) confers standing on the DNC.[1] The DNC's suit is an "actio[n] for declaratory judgment or injunctive relief," brought by "the national committee of [a] political party," in order "to implement or construe" a provision of the Fund Act. See § 9011(b)(1). Therefore, the only possible reason for not allowing the suit is that, as the majority holds, it is inconsistent with the statute's limitation to "such actions . . . as may be appropriate."

The majority exalts the requirement of appropriateness by ignoring the term's context. Section 9011(b)(1) does not impose a free-floating requirement that any action brought thereunder meet some undefined standard of sound policy. Rather it merely refers to "such actions . . . as may be appropriate to implement or con[s]true" the Fund Act. The term "appropriate" limits the type of suit permissible to those aimed at implementing or construing the Act. Thus, the named plaintiffs cannot bring just any action for declaratory judgment or injunctive relief, but only those that would be "appropriate to implement or con[s]true" the Act.[2] The DNC's present suit satisfies that standard. The focus is the nature of the lawsuit, not the identity of the plaintiff. To read more into the term than this is to treat it as an invitation to unconstrained judicial policymaking.

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[1] I agree with the majority that, under the plain terms of § 9011(b)(1), the Democratic Party has no cause of action.

By placing a greater burden on the term "appropriate" than it can bear, the majority reaches a result that also conflicts with the rest of the provision. Section 9011(b)(1) itself draws no distinction between the FEC and other plaintiffs. To the contrary, by listing them together it implies that they enjoy an equal capacity to bring suit. Indeed, the majority seems to agree. Acknowledging that a suit by the DNC might be "appropriate," it finds its hands tied by the statute's failure to distinguish between possible plaintiffs: "Congress simply did not draft the statute in a way that distinguishes the DNC from any individual voter." *Ante*, at 488. This statement is perplexing, for the statute does not distinguish either from the FEC—though the majority does so anyway.

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[2] Section 9011(b)(1) mirrors 2 U. S. C. § 437h(a), which allows the same plaintiffs to "institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of" the FECA. That section provides for certification of the constitutional question to the en banc court of appeals, and expedited review in this Court. I would read the word "appropriate" in both provisions identically, that is, as referring to the sort of controversy as to which the court's jurisdiction may be invoked.

I also note that individuals are unquestionably able to invoke the rather drastic provisions for expedited review provided by § 437h. See *Bread Political Action Committee* v. *FEC*, 455 U. S. 577 (1982); 120 Cong. Rec. 35140 (1974) (statement of Rep. Frenzel). In light of the clear intent behind § 437h, I have less difficulty than does the majority in believing that Congress similarly "intended every one of the millions of eligible voters in this country to have the power to invoke expedited review by a three-judge district court with direct appeal to this Court in actions brought" under § 9011(b)(1). See *ante*, at 487–488.

It is not clear why the majority feels free to ignore the statutory language in order to separate the FEC from other plaintiffs, but obliged to adhere to it so as not to distinguish party committees from individual voters.

Rather than applying the statute's plain words, the majority examines the overall election law scheme to discover what it thinks Congress would consider "appropriate." But Congress does not usually operate by such complex hidden meanings, and if Congress had intended what the majority says it did, it chose the least helpful way of saying so. It is surprising to learn that while the FEC, a national committee, and an individual may each sue under the Act, the latter two may sue only the first. Surely if this is what Congress had intended, it would have chosen a more convenient way of saying it.[3]

The majority relies primarily on 2 U. S. C. § 437c(b)(1), which grants the FEC "exclusive jurisdiction with respect to the civil enforcement of" the Act. When it adopted this provision, Congress did not change § 9011, which had already been in existence for five years. Indeed, except for the 1974 substitution of the Commission for the Comptroller General, § 9011 has never been amended, despite the frequent changes to the FECA and to other Fund Act provisions. By basing its argument on § 437c(b)(1), the majority contends in effect that § 9011 was repealed by implication. Absent a clear indication that such a repeal was intended, we should not infer it. *Kaiser Steel Corp.* v. *Mullins*, 455 U. S. 72, 88 (1982); *Posadas* v. *National City Bank*, 296 U. S. 497, 503 (1936).

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[3] The majority points to § 9010(a), which authorizes the FEC to "appear in and defend against any action filed under section 9011," as evidence that § 9011 suits "would be directed at the FEC." *Ante*, at 487. At most, this provision indicates that § 9011 suits *could* be directed against the Commission. In any event, the "defend against" language is fully explained by § 9011(a), which authorizes suits by "any interested person" to review "[a]ny certification, determination, or other action by the Commission." It is likely that § 9010(a) was designed merely to give the FEC authority to defend itself in these actions. Cf. 26 U. S. C. § 9040(a). It is also worth noting that if Congress really intended that private parties be able to sue only the FEC, it essentially accomplished that purpose in § 9011(a).

Here, all indications are to the contrary. When enacted, as part of the 1974 amendments to the FECA, § 437c(b)(1) provided the Commission with "primary jurisdiction with respect to the civil enforcement of" that Act. S. Conf. Rep. No. 93–1237, p. 22 (1974). There was no reference to the Fund Act at that time, or to the FEC's "exclusive" jurisdiction. Those were added in 1976. Pub. L. 94–283, § 101(c)(2), 90 Stat. 476. Two points must be made about the 1976 Amendments. First, the reference to "exclusive" jurisdiction was designed to centralize all *governmental* enforcement authority in the FEC. See H. R. Rep. No. 94–917, pp. 3–4 (1976).[4] The majority does not deny this, but states that there is no indication that anyone other than the Government agencies ever had any enforcement authority. *Ante*, at 489. The indication that the majority overlooks is § 9011(b)(1) itself.[5]

The second significant aspect of the 1976 Amendments is the addition of 2 U. S. C. § 437d(e). That section provides: "Except as provided in section 437g(a)(8) of this title, the power of the Commission to initiate civil actions under subsection (a)(6) of this section shall be the exclusive civil remedy for the enforcement of the provisions of this Act."

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[4] Prior to 1976, the FECA included criminal proscriptions, found in Title 18 of the United States Code, whose enforcement was left to the Attorney General. In addition, civil enforcement authority was granted to both the FEC and the Attorney General. "The result was that enforcement responsibility was fragmented, and the line between improper conduct remediable in civil proceedings and conduct punishable as a crime blurred." H. R. Rep. No. 94–917, p. 3 (1976). The 1976 Amendments were designed to centralize enforcement authority in the Commission. *Id.*, at 3–4; S. Rep. No. 94–677, p. 7 (1976).

[5] The majority states that § 9011(b)(1) has nothing to do with "enforcement." *Ante*, at 489. If true, this assertion undermines the majority's reliance on § 437c(b)(1) in the first place. That section grants the FEC "exclusive jurisdiction with respect to . . . civil enforcement"; it says nothing about "exclusive jurisdiction" to bring suits to implement or construe.

"This Act" is specifically defined as the FECA. § 431(19). See also H. R. Rep. No. 94–917, p. 61 (1976). The reference to "this Act" in § 437d(e) is in marked contrast to the repeated references to "the provisions of this Act and chapter 95 and chapter 96 of title 26" (*i. e.*, the Fund Act), also added in 1976, found throughout these provisions. See, *e. g.*, §§ 437d(a)(6), (8); § 437f(c)(2); §§ 437g(a)(1), (2), (5), (6). The conspicuous absence of any reference to the Fund Act in § 437d(e) indicates that Congress intentionally made the FEC's litigating authority exclusive only as to the FECA. This section makes it quite clear that actions under § 437g(a)(8) are the only permissible suits a private party may bring to implement or construe the FECA, but, by negative implication, it also suggests that private suits are not so limited under the Fund Act.

B

The majority places no reliance on the legislative history of § 9011. Admittedly, little is to be found. But what there is suggests that the DNC has standing to bring this action. Section 9011 was part of the Revenue Act of 1971. Pub. L. 92–178, § 801, 85 Stat. 570. It was in neither the House nor the Senate bill. In their joint explanatory statement, the conferees wrote that they had added "a provision to allow the Comptroller General or other interested parties to bring court actions in order to implement or construe the new provisions." S. Conf. Rep. No. 92–553, p. 58 (1971). This description provides no basis for distinguishing the Comptroller General (in the amended statute, the FEC) from the "other interested parties." Rather, it implies equal and independent authority to go to court.

The Conference Report goes on to note that "[b]ecause the provisions of this title will have a direct and immediate effect on the actions of individuals, organizations, and political parties . . . [who] must know" what candidates and parties will receive what funding, the bill provides for "expeditious disposition of legal proceedings brought with respect to these provisions." *Id.*, at 58–59. This desire for speedy determinations explains why Congress provided the private right of action today's holding eliminates. It also undermines the majority's conclusion that it is "appropriate" to require those other than the FEC to file a complaint with the FEC and wait for it to act, or not act, sue to compel it to do so, and only then, if the FEC ignores a court order, bring suit themselves. That is a prescription for delay. The conferees' concern for the expeditious resolution of suits brought by "other interested parties" indicates that they did not want to restrict implementation of the Fund Act to a Government agency.

C

"Appropriate" is not an ideal statutory term. But its vagueness should not be taken advantage of in order to read the provision in which it appears out of the United States Code. It is not an invitation to judicial legislation. A more restrained reading, consistent with congressional intent, the surrounding provisions, and, most important, the terms of the statute itself, is strongly indicated.

II

Section 9012(f) of the Internal Revenue Code limits to $1,000 the annual independent expenditures a PAC can make to further the election of a candidate receiving public funds. Because these expenditures "produce speech at the core of the First Amendment," *ante*, at 493, the majority concludes that they can only be regulated in order to avoid real or apparent corruption. Perceiving no such danger, since the money does not go directly to political candidates or their committees, it strikes down § 9012(f).

My disagreements with this analysis, which continues this Court's dismemberment of congressional efforts to regulate campaign financing, are many. First, I continue to believe that *Buckley* v. *Valeo*, 424 U. S. 1 (1976), was wrongly decided. Congressional regulation of the amassing and spending of money in political campaigns without doubt involves First Amendment concerns, but restrictions such as the one at issue here are supported by governmental interests—including, but not limited to, the need to avoid real or apparent corruption—sufficiently compelling to withstand scrutiny. Second, even were *Buckley* correct, I consider today's holding a mistaken application of that precedent. The provision challenged here more closely resembles the contribution limitations that were upheld in *Buckley*, and later cases, than the limitations on uncoordinated individual expenditures that were struck down. Finally, even if *Buckley* requires that in general PACs be allowed to make independent expenditures, I do not think that that proposition applies to § 9012(f). As part of an integrated and complex system of public funding for Presidential campaigns, § 9012(f) is supported by governmental interests that were absent in *Buckley*, which was premised on a system of private campaign financing.

A

In *Buckley*, I explained at some length why I am quite sure that regulations of campaign spending similar to that at issue here are constitutional. See 424 U. S., at 257–266. I adhere to those views. The First Amendment protects the right to speak, not the right to spend, and limitations on the amount of money that can be spent are not the same as restrictions on speaking. I agree with the majority that the expenditures in this case "produce" core First Amendment speech. See *ante*, at 493. But that is precisely the point: they produce such speech; they are not speech itself. At least in these circumstances, I cannot accept the identification of speech with its antecedents. Such a house-that-Jack-built approach could equally be used to find a First Amendment right to a job or to a minimum wage to "produce" the money to "produce" the speech.

The burden on actual speech imposed by limitations on the spending of money is minimal and indirect. All rights of direct political expression and advocacy are retained. Even under the campaign laws as originally enacted, everyone was free to spend as much as they chose to amplify their views on general political issues, just not specific candidates. The restrictions, to the extent they do affect speech, are viewpoint-neutral and indicate no hostility to the speech itself or its effects.[6]

If the elected Members of the Legislature, who are surely in the best position to know, conclude that large-scale expenditures are a significant threat to the integrity and fairness of the electoral process, we should not second-guess that judgment. *FEC* v. *National Right to Work Committee,* 459 U. S. 197, 210 (1982). Like the expenditure limitations struck down in *Buckley,* § 9012(f) serves to back up the limitations on direct campaign contributions, eliminate the danger of corruption, maintain public confidence in the integrity of federal elections, equalize the resources available to the candidates, and hold the overall amount of money devoted to political campaigning down to a reasonable level. I consider these purposes both legitimate and substantial, and more than sufficient to support the challenged provision's incidental and minor burden on actual speech.

In short, as I said in *Buckley,* 424 U. S., at 262, I cannot accept the cynic's "money talks" as a proposition of constitutional law. Today's holding also rests on a second aspect of the *Buckley* holding with which I disagree, viz., its distinction between "independent" and "coordinated" expenditures. The Court was willing to accept that expenditures undertaken in consultation with a candidate or his committee should be viewed as contributions. *Id.,* at 46. But it rejected Congress' judgment that independent expenditures were matters of equal concern, concluding that they did not pose the danger of real or apparent corruption that supported limits on contributions.[7] The distinction is not tenable. "Independent" PAC expenditures function as contributions. Indeed, a significant portion of them no doubt would be direct contributions to campaigns had the FECA not limited such contributions to $5,000. See 2 U. S. C. § 441a(a)(2)(A). The growth of independent PAC spending has been a direct and openly acknowledged response to the contribution limits in the FECA. See, *e. g.*, Brief for Appellees 3–4. In general, then, the reasons underlying limits on contributions equally underly limits on such "independent" expenditures.

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[6] The situation might be different if the regulation significantly favored incumbents; for example, if Congress had imposed unreasonably low spending limits that placed a particular burden on challengers. There is no indication that is the case.

The credulous acceptance of the formal distinction between coordinated and independent expenditures blinks political reality. That the PACs' expenditures are not formally "coordinated" is too slender a reed on which to distinguish them from actual contributions to the campaign. The candidate cannot help but know of the extensive efforts "independently" undertaken on his behalf. In this realm of possible tacit understandings and implied agreements, I see no reason not to accept the congressional judgment that so-called independent expenditures must be closely regulated.[8]

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[7] I note that the actual rationale of the *Buckley* Court was that "independent advocacy . . . *does not presently appear* to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions." 424 U. S., at 46 (emphasis added). The possibility was thus left open, and remains open, that unforeseen developments in the financing of campaigns might make the need for restrictions on "independent" expenditures more compelling. See also *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 789–790 (1978). The exponential growth in PAC expenditures, accompanied by an equivalent growth in public and congressional concern, suggests that independent expenditures may well prove to be more serious threats than they appeared in 1976. See generally Hearings on S. 85 et al. before the Senate Committee on Rules and Administration, 98th Cong., 1st Sess. (1983) (hereinafter 1983 Hearings); Contribution Limitations and Independent Expenditures, Hearings before the Task Force on Elections of the House Committee on House Administration, 97th Cong., 2d Sess., 151–437 (1982). The time may come when the governmental interests in restricting such expenditures will be sufficiently compelling to satisfy not only Congress but a majority of this Court as well.

The PACs do not operate in an anonymous vacuum. There are significant contacts between an organization like NCPAC and candidates for, and holders of, public office. In addition, personnel may move between the staffs of candidates or officeholders and those of PACs. See generally App. 30–40, Joint Stipulations of Fact Nos. 40–103. This is not to say that there has in the past been any improper coordination or political favors. We need not evaluate the accuracy of reports of such activities, or of the perception that large-scale independent PAC expenditures mean "the return of the big spenders whose money talks and whose gifts are not forgotten." See N. Y. Times, June 15, 1980, section 4, p. 20E, col. 1. It is enough to note that there is ample support for the congressional determination that the corrosive effects of large campaign contributions—not least among these a public perception of business as usual—are not eliminated solely because the "contribution" takes the form of an "independent expenditure." "Preserving the integrity of the electoral process [and] the individual citizen's confidence in government" "are interests of the highest importance." *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 788–789 (1978).

As in *Buckley*, I am convinced that it is pointless to limit the amount that can be contributed to a candidate or spent with his approval without also limiting the amounts that can be spent on his behalf.[9] In the Fund Act, Congress limited contributions, direct or coordinated, to zero. It is nonsensical to allow the purposes of this limitation to be entirely defeated by allowing the sort of "independent" expenditures at issue here, and the First Amendment does not require us to do so.

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[8] In opposing an early version of campaign spending legislation, Senator Gore objected to the bill because "expenditures would be outside the so-called restriction as long as the candidate had no 'control' over the organization, and lack of 'control' is very easy to manage." 113 Cong. Rec. 10201 (1967). See also 1983 Hearings, at 56 (statement of Sen. Bentsen).

[9] In a discussion with which I entirely agree, the Senate Committee supported the 1974 limits on "independent expenditures" as follows:

"[S]uch controls are imperative if Congress is to enact meaningful limits on direct contributions. Otherwise, wealthy individuals limited to a $3,000

B

Even if I accepted *Buckley* as binding precedent, I nonetheless would uphold § 9012(f). *Buckley* distinguished "direct political expression," which could not be curtailed, from financial contributions, which could. 424 U. S., at 21–22. Limitations on expenditures were considered direct restraints on the right to speak one's mind on public issues and to engage in advocacy protected by the First Amendment. *Id.*, at 48. The majority views the challenged provision as being in that category. I disagree.

The majority never explicitly identifies whose First Amendment interests it believes it is protecting. However, its concern for rights of association and the effective political speech of those of modest means, *ante*, at 494–495, indicates that it is concerned with the interests of the PACs' contributors. But the "contributors" are exactly that—contributors, rather than speakers. Every reason the majority gives for treating § 9012(f) as a restraint on speech relates to the effectiveness with which the donors can make their voices heard. In other

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direct contribution could also purchase one hundred thousand dollars' worth of advertisements for a favored candidate. Such a loophole would render direct contribution limits virtually meaningless.

"Admittedly, expenditures made directly by an individual to urge support of a candidate pose First Amendment issues more vividly than do financial contributions to a campaign fund. Nevertheless, to prohibit a $60,000 direct contribution to be used for a TV spot commercial but then to permit the would-be contributor to purchase the time himself, and place a commercial endorsing the candidate, would exalt constitutional form over substance. Your Committee does not believe the First Amendment requires such a wooden construction." S. Rep. No. 93–689, pp. 18–19 (1974).

words, what the majority purports to protect is the right of the contributors to make contributions.

But the contributors are not engaging in speech; at least, they are not engaging in speech to any greater extent than are those who contribute directly to political campaigns. *Buckley* explicitly distinguished between, on the one hand, using one's own money to express one's views, and, on the other, giving money to someone else in the expectation that that person will use the money to express views with which one is in agreement. This case falls within the latter category. As the *Buckley* Court stated with regard to contributions to campaigns, "the transformation of contributions into political debate involves speech by someone other than the contributor." 424 U. S., at 21. The majority does not explain the metamorphosis of donated dollars from money into speech by virtue of the identity of the donee.

It is true that regulating PACs may not advance the Government's interest in combating corruption as directly as limiting contributions to a candidate's campaign. See *Buckley*, 424 U. S., at 46. But this concern relates to the governmental interest supporting the regulation, not to the nature of the conduct regulated. Even if spending money is to be considered speech, I fail to see how giving money to an independent organization to use as it wishes is also speech. I had thought the holding in *Buckley* was exactly the opposite. Certainly later cases would so indicate. See *FEC* v. *National Right to Work Committee*, 459 U. S. 197 (1982); *California Medical Assn.* v. *FEC*, 453 U. S. 182 (1981).

The Court strikes down § 9012(f) because it prevents PAC donors from effectively speaking by proxy. But appellees are not simply mouthpieces for their individual contributors. The PAC operates independently of its contributors. See App. 26, Joint Stipulation No. 13. Donations go into the committee's general accounts. See App. 28–29, Joint Stipulations Nos. 27–30. It can safely be assumed that each contributor does not fully support every one of the variety of activities undertaken and candidates supported by the PAC to which he contributes. It is true, as the majority points out, that in general the contributors presumably like what they hear. However, "this sympathy of interests alone does not convert" the PACs' speech into that of its contributors. *California Medical Assn.* v. *FEC*, *supra*, at 196.[10]

Finally, the burden imposed by § 9012(f) is slight. Exactly like the contributions limits upheld in *Buckley*, § 9012(f) "does not in any way infringe the contributor's freedom to discuss candidates and issues." 424 U. S., at 21. And because it does not limit personal expenditures, it does not "reduce the total amount of money potentially available to promote political expression." *Id.*, at 22. Accordingly, *Buckley* indicates that the decision below should be reversed.

C

These cases are in any event different enough from *Buckley* that that decision is not dispositive. The challenged provision is not part of the FECA, whose expenditure limitations were struck down in *Buckley*. Rather, it is part of the Fund Act, which was, to the extent it was before the Court, upheld.

The Fund Act provides major party candidates the option of accepting public financing, drawn from a fund composed of voluntary checkoffs from federal income tax payments, and forgoing all private contributions. In upholding this system in *Buckley,* we accepted Congress' judgment that it would go far "to reduce the deleterious influence of large contributions on our political process, to facilitate communication by candidates with the electorate, and to free candidates from the rigors of fundraising." 424 U. S., at 91. Indeed, we were of the view that the Fund Act "furthers, not abridges, pertinent First Amendment values" by using "public money to facilitate and enlarge public discussion and participation in the electoral process." *Id.*, at 92–93.

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[10] It is unclear whether the majority views § 9012(f) as an unconstitutional restriction on the First Amendment rights of appellees themselves. To the extent it does, I would have thought that such a conclusion was foreclosed by the Court's unanimous holding in *FEC* v. *National Right to Work Committee*, 459 U. S. 197 (1982). That decision cannot be explained away as merely a corporations case. *Ante*, at 495–496. The respondent in that case resembled appellees here far more closely than it resembled the traditional business corporation. In any event, the opinion referred broadly to "unions, corporations, and similar organizations," citing to a case involving a PAC, 459 U. S., at 210–211, and its reasoning applies equally here.

It is quite clear from the statutory scheme and the legislative history that the public financing alternative was to be comprehensive and exclusive—a total substitution for private financing. If the public funding merely supplements rather than supplants the private, its benefits are nil. Indeed, early proposals for public financing came to grief on exactly this problem. For example, Congress passed a public funding scheme in 1966, Foreign Investors Tax Act of 1966, Pub. L. 89–809, 80 Stat. 1539, only to repeal it a year later. One of the reasons for abandoning that effort was, in the words of the sponsor of the repealing legislation, that it failed to limit the "raising and spending of private funds on behalf of presidential candidates or any other candidates" and would permit fundraising and spending to proceed as it had. 113 Cong. Rec. 8062–8063 (1967) (remarks of Sen. Gore). The same objection was voiced with regard to other proposals. See *id.*, at 30772–30773; Political Campaign Financing Proposals, Hearings before the Senate Committee on Finance, 90th Cong., 1st Sess., 169, 364, 389–390 (1967) (statements of Sens. Williams and Cannon). It is precisely this defect that § 9012(f) is designed to avoid.

Because it is an indispensable component of the public funding scheme, § 9012(f) is supported by governmental interests absent in *Buckley.* Rather than forcing Congress to abandon public financing because it is unworkable without constitutionally prohibited restrictions on independent spending, I would hold that § 9012(f) is permissible precisely because it is a necessary, narrowly drawn[11] means to a constitutional end. The need to make public financing, with its attendant benefits, workable is a constitutionally sufficient additional justification for the burden on First Amendment rights.

The existence of the public financing scheme changes the picture in other ways as well. First, it heightens the danger of corruption discounted by the majority. If a candidate accepts public financing, private contributions are limited to zero. 26 U. S. C. §§ 9003(b)(2), 9012(b). Where there are no contributions being made directly to the candidate or his committee, and no expenditures of private funds subject to his direct control, "independent" expenditures are thrown into much starker relief. If those are the only private expenditures, their independence is little assurance that they will not be noticed, appreciated, and, perhaps, repaid.

The majority argues that there is no danger here of direct political favors—the paradigmatic ambassadorship in exchange for a large contribution. Accepting, *arguendo*, this assertion, I still do not share the majority's equanimity about the infusion of massive PAC expenditures into the political process. The candidate may be forced to please the spenders rather than the voters, and the two groups are not identical. The majority concedes that aggregations of wealth influence the candidate for political office.[12] It is exactly this influence that Congress sought to escape in providing for public financing of Presidential elections, and that supports the limitations it imposed.

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[11] Congress debated proposals to extend § 9012(f) to other organized groups or even individuals. See H. R. Rep. No. 92-708, p. 58 (1971); 117 Cong. Rec. 42397-42402, 42626-42627 (1971). It rejected such proposals in part out of concern for the constitutionality of any more sweeping restriction. See *id.*, at 42626. In light of Congress' careful balancing of First Amendment concerns against the integrity and effectiveness of public funding, I would be especially cautious before striking down its compromise.

Despite the restricted reach of § 9012(f), the majority announces that it is overbroad. I do not think these are appropriate cases for the "strong medicine" of overbreadth analysis, which "has been employed by the Court sparingly and only as a last resort," *Broadrick* v. *Oklahoma*, 413 U. S. 601, 613 (1973), and which assumes a chilling effect that, frankly, does not seem to be a problem here. In any event, the statute withstands scrutiny. It is carefully limited to those organizations, spending that amount of money, that Congress believed threatened the integrity of the electoral process. I fully share the majority's inability to "distinguish in principle between a PAC that has solicited 1,000 $25 contributions and one that has solicited 100,000 $25 contributions." *Ante*, at 499. But that is exactly why the statute is *not* overbroad. See *Members of City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U. S. 789, 801-802 (1984).

The provision for exclusive public funding not only enhances the danger of real or perceived corruption posed by independent expenditures, it also gives more weight to the interest in holding down the overall cost of political campaigns. In *Buckley*, this concern was partly ignored and partly rejected as not achieved by the means chosen. See 424 U. S., at 25–26, and n. 27, 48–49. Neither course is possible here. The Fund Act was a response not merely to "the influence of excessive private political contributions," but also to the "dangers of spiraling campaign expenditures." H. R. Rep. No. 93–1239, p. 13 (1974). I am unwilling to discount the latter concern, particularly in the context of a scheme where public financing is supposed to replace private financing and cap total expenditures. Certainly there can be no concern that communication will suffer for want of money spent on the campaigns.[13] Finally, in the context of the public financing scheme, the apparent congressional desire that elections should be between equally well financed candidates and not turn on the amount of money spent for one or the other is all the more compelling, and the danger of funding disparities more serious.

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[12] One Senator has stated with regard to congressional campaigning:

"[T]he current system of financing congressional elections . . . virtually forces Members of Congress to go around hat in hand, begging for money from Washington-based special interest groups, political action committees whose sole purpose for existing is to seek a quid pro quo. . . . We see the degrading spectacle of elected representatives completing detailed questionnaires on their positions on special interest issues, knowing that the monetary reward of PAC support depends on the correct answers." 1983 Hearings, at 49 (statement of Sen. Eagleton).

[13] During the 1984 general election campaign, each major party candidate received $40.4 million in public funds, and each national committee was

D

By striking down one portion of an integrated and comprehensive statute, the Court has once again transformed a coherent regulatory scheme into a nonsensical, loophole-ridden patchwork. As THE CHIEF JUSTICE pointed out with regard to the similar outcome in *Buckley*, "[b]y dissecting the Act bit by bit, and casting off vital parts, the Court fails to recognize that the whole of this Act is greater than the sum of its parts." 424 U. S., at 235. Without § 9012(f), Presidential candidates enjoy extensive public financing while those who would otherwise have worked for or contributed to a campaign had there been no such funding will pursue the same ends through "independent" expenditures. The result is that the old system remains essentially intact, but that much more money is being spent. In overzealous protection of attenuated First Amendment values, the Court has once again managed to assure us the worst of both worlds. I respectfully dissent.

JUSTICE MARSHALL, dissenting.

In *Buckley* v. *Valeo*, 424 U. S. 1 (1976) *(per curiam)*, this Court upheld congressional limitations on contributions to candidates for federal office but struck down limitations on independent expenditures made on behalf of such candidates. In upholding the former, the Court stated that "the weighty interests served by restricting the size of financial contributions to political candidates are sufficient to justify the limited effect upon First Amendment freedoms caused by the $1,000 contribution ceiling." *Id.*, at 29. In striking down

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permitted to spend another $6.9 million on its candidate's behalf. N. Y. Times, Aug. 29, 1984, p. A20, col. 1.

the latter, the Court noted that an expenditure limitation "fails to serve any substantial interest in stemming the reality or appearance of corruption in the electoral process," and that "it heavily burdens core First Amendment expression." *Id.*, at 47–48. Relying on *Buckley*, the Court today strikes down a limitation on expenditures by "political committees." Although I joined the portion of the *Buckley per curiam* that distinguished contributions from independent expenditures for First Amendment purposes, I now believe that the distinction has no constitutional significance.

The contribution/expenditure distinction in *Buckley* was grounded on two factors. First, the Court reasoned that independent expenditures offer significantly less potential for abuse than contributions:

> "Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and may indeed prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." *Id.*, at 47.

Undoubtedly, when an individual interested in obtaining the proverbial ambassadorship had the option of either contributing directly to a candidate's campaign or doing so indirectly through independent expenditures, he gave money directly. It does not take great imagination, however, to see that, when the possibility for direct financial assistance is severely limited, as it is in light of *Buckley*'s decision to uphold the contribution limitation, such an individual will find other ways to financially benefit the candidate's campaign. It simply belies reality to say that a campaign will not reward massive financial assistance provided in the only way that is legally available. And the possibility of such a reward provides a powerful incentive to channel an independent expenditure into an area that a candidate will appreciate. Surely an eager supporter will be able to discern a candidate's needs and desires; similarly, a willing candidate will notice the supporter's efforts. To the extent that individuals are able to make independent expenditures as part of a *quid pro quo*, they succeed in undermining completely the first rationale for the distinction made in *Buckley*.

The second factor supporting the distinction between contributions and expenditures was the relative magnitude of the First Amendment interest at stake. The Court found that the constitutional interest implicated in the limitation on expenditures was the right to advocate the election or defeat of a particular candidate. This right, the Court reasoned, "is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation." *Id.*, at 48. In contrast, the Court found that the limitation on contributions primarily implicated "the contributor's freedom of political association." *Id.*, at 24–25. Although the Court acknowledged that this right was a "fundamental" one, *id.*, at 25, it concluded that the expenditure ceiling imposed significantly more severe restrictions on political freedoms than the contribution limitation, *id.*, at 23.

I disagree that the limitations on contributions and expenditures have significantly different impacts on First Amendment freedoms. First, the underlying rights at issue—freedom of speech and freedom of association—are both core First Amendment rights. Second, in both cases the regulation is of the same form: It concerns the amount of money that can be spent for political activity. Thus, I do not see how one interest can be deemed more compelling than the other.*

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*At the time *Buckley* was decided, three of the eight Members who heard that case agreed that contributions and expenditures should be treated in the same manner for First Amendment purposes. See 424 U. S., at 241 (opinion of BURGER, C. J.) ("For me contributions and expenditures are two sides of the same First Amendment coin"); *id.*, at 261

In summary, I am now unpersuaded by the distinction established in *Buckley*. I have come to believe that the limitations on independent expenditures challenged in that case and here are justified by the congressional interests in promoting "the reality and appearance of equal access to the political arena," *id.*, at 287 (opinion of MARSHALL, J.), and in eliminating political corruption and the appearance of such corruption. Therefore, I dissent, substantially for the reasons expressed in Parts II–A, II–C, and II–D of JUSTICE WHITE's dissent, from the Court's decision today to strike down § 9012(f)'s limitation on independent expenditures by "political committees."

Also, I join Part I of JUSTICE WHITE's dissent, which concerns the standing of the Democratic National Committee.

(opinion of WHITE, J.) ("For constitutional purposes it is difficult to see the difference between the two situations"); *id.*, at 290 (opinion of BLACKMUN, J.) ("I am not persuaded that the Court makes, or indeed is able to make, a principled constitutional distinction between the contribution limitations, on the one hand, and the expenditure limitations, on the other, that are involved here").

UNITED STATES *v.* GAGNON ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 84–690. Decided March 18, 1985

At a recess during respondents' Federal District Court trial for participation in a cocaine distribution conspiracy, the bailiff informed the judge—in the presence of respondents, their respective counsel, and the Assistant United States Attorney, but outside the jury's presence—that one of the jurors had expressed concern because he had noticed respondent Gagnon sketching jurors during the trial. After Gagnon's attorney admitted that Gagnon had been sketching jurors, the judge ordered that the practice cease immediately, and, upon such attorney's suggestion, the judge stated that she would speak with the juror in chambers. No respondent filed any objection or requested to be present at the discussion in chambers. At the *in camera* meeting, which Gagnon's counsel attended, the juror was informed that Gagnon was an artist and meant no harm, that the sketchings had been confiscated, and that Gagnon would sketch no more. The juror, upon being questioned by the judge and by Gagnon's counsel, indicated his willingness to continue as an impartial juror. The trial then resumed; a transcript of the *in camera* proceeding was made available to all of the parties; no objections to the proceeding or motions to disqualify the juror were made; and, after guilty verdicts were returned against all of the respondents, no post-trial motions concerning the incident were made. On a consolidated appeal, the Court of Appeals reversed all of the respondents' convictions, holding that the *in camera* proceeding violated their rights under Federal Rule of Criminal Procedure 43 to be present "at every stage of the trial," as well as their right to be present under the Due Process Clause of the Fifth Amendment.

Held:

1. Respondents' rights under the Fifth Amendment Due Process Clause were not violated by the *in camera* discussion with the juror. The defense has no constitutional right to be present at every interaction between a judge and a juror. The right to presence, while rooted to a large extent in the Confrontation Clause of the Sixth Amendment, is protected by the Due Process Clause in some situations where the defendant is not actually confronting witnesses or evidence against him. However, a defendant's presence is a condition of due process only to the extent that a fair and just hearing would be thwarted by his absence. Here, the presence of respondents and their counsel at the *in camera*

discussion was not required to ensure fundamental fairness or a reasonably substantial opportunity to defend against the charge.

2. Assuming that the conference with the juror was a "stage of the trial" for purposes of Rule 43, the Court of Appeals erred in concluding that respondents had not waived their rights under the Rule to be present at the conference. Respondents neither requested to attend the conference nor, either before or after the conference, filed any objections to or motions concerning the conference. A district court need not get an express waiver from a defendant for every trial conference which a defendant may have a right to attend. The conclusion that respondents waived their Rule 43 rights comports both with the Rule's language and with the everyday practicalities of conducting a trial.

Certiorari granted; 721 F. 2d 672, reversed.

PER CURIAM.

The four respondents were indicted on various counts and tried together in Federal District Court for participation in a large-scale cocaine distribution conspiracy. During the afternoon recess on the first day of trial the District Judge was discussing matters of law in open court with the respondents, their respective counsel, and the Assistant United States Attorney, outside the presence of the jury. The bailiff entered the courtroom and informed the judge that one of the jurors, Garold Graham, had expressed concern because he had noticed respondent Gagnon sketching portraits of the jury. Gagnon's attorney admitted that Gagnon had been sketching jury members during the trial. The District Judge ordered that the practice cease immediately. Gagnon's lawyer suggested that the judge question the juror to ascertain whether the sketching had prejudiced the juror against Gagnon. The judge then stated, still in open court in the presence of each respondent and his counsel: "I will talk to the juror in my chambers and make a determination. We'll stand at recess." No objections were made by any respondent and no respondent requested to be present at the discussion in chambers.

The District Judge then went into the chambers and called for juror Graham. The judge also requested the bailiff to bring Gagnon's counsel to chambers. There the judge, in the company of Gagnon's counsel, discussed the sketching with the juror. The juror stated:

> ". . . I just thought that perhaps because of the seriousness of the trial, and because of—whichever way the deliberations go, it kind of—it upset me, because—of what could happen afterwards."

The judge then explained that Gagnon was an artist, meant no harm, and the sketchings had been confiscated. The juror was assured that Gagnon would sketch no more. Graham stated that another juror had seen the sketching and made a comment to him about it but no one else seemed to have noticed, and no other jurors had discussed the matter. The judge then elicited from Graham his willingness to continue as an impartial juror. Gagnon's counsel asked two questions of the juror and then stated that he was satisfied. The *in camera* meeting broke up, and the trial resumed. A transcript of the *in camera* proceeding was available to all of the parties; at no time did any respondent mention or object to the *in camera* interview of the juror. No motions were made to disqualify Graham or the other juror who witnessed the sketching, nor did any respondent request that cautionary instructions be given to the jury. After the jury returned guilty verdicts no post-trial motions concerning the incident were filed with the District Court.

On the consolidated appeal, however, each respondent claimed that the District Court's discussion with the juror in chambers violated respondents' Sixth Amendment rights to an impartial jury and their rights under Federal Rule of Criminal Procedure 43[1] to be present at all stages of the

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[1] Rule 43 provides:

"(a) Presence Required. The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.

"(b) Continued Presence Not Required. The further progress of the trial to and including the return of the verdict shall not be prevented and trial. A divided panel of the Court of Appeals for the Ninth Circuit reversed the convictions of all respondents, holding that the *in camera* discussion with the juror violated respondents' rights under Rule 43 and the Due Process Clause of the Fifth Amendment. 721 F. 2d 672 (1983).

The Court of Appeals held that all four respondents had due process and Rule 43 rights to be personally present at the *in camera* discussion, and these rights were substantial enough to be noticed as plain error on appeal under Federal Rule of Criminal Procedure 52(b), notwithstanding respondents' failure to preserve the issue by raising it in the District Court. Although the juror was only worried about Gagnon's conduct, the Court of Appeals held that the juror's potential prejudice against Gagnon might harm all respondents because they were joint actors charged and tried together for conspiracy.

The court stated that it could find nothing in the record to "conclusively determine" that respondents waived their Rule 43 rights. The Court of Appeals found "no indication of whether Gagnon or the other defendants expressly or impliedly implicated their willingness to be absent from the

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the defendant shall be considered to have waived his right to be present whenever a defendant, initially present,

"(1) voluntarily absents himself after the trial has commenced (whether or not he has been informed by the court of his obligation to remain during the trial), or

"(2) after being warned by the court that disruptive conduct will cause him to be removed from the courtroom, persists in conduct which is such as to justify his being excluded from the courtroom.

"(c) Presence Not Required. A defendant need not be present in the following situations:

"(1) A corporation may appear by counsel for all purposes.

"(2) In prosecutions for offenses punishable by fine or by imprisonment for not more than one year or both, the court, with the written consent of the defendant, may permit arraignment, plea, trial, and imposition of sentence in the defendant's absence.

"(3) At a conference or argument upon a question of law.

"(4) At a reduction of sentence under Rule 35."

conference." 721 F. 2d, at 677. That no objection was made to holding the conference without respondents was, to the court, irrelevant on the question of voluntary absence under Rule 43. Because the court found no waiver of the Rule 43 right to be present, it stated that *a fortiori* it could not conclude that respondents had made an intentional and knowing relinquishment of their due process right to be present. *Ibid.*, citing *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938). Finally, the court held that the harmless-error rule did not excuse the errors committed by the District Court.

We think it clear that respondents' rights under the Fifth Amendment Due Process Clause were not violated by the *in camera* discussion with the juror. "[T]he mere occurrence of an *ex parte* conversation between a trial judge and a juror does not constitute a deprivation of any constitutional right. The defense has no constitutional right to be present at every interaction between a judge and a juror, nor is there a constitutional right to have a court reporter transcribe every such communication." *Rushen* v. *Spain*, 464 U. S. 114, 125-126 (1983) (STEVENS, J., concurring in judgment).

The constitutional right to presence is rooted to a large extent in the Confrontation Clause of the Sixth Amendment, *e. g.*, *Illinois* v. *Allen*, 397 U. S. 337 (1970), but we have recognized that this right is protected by the Due Process Clause in some situations where the defendant is not actually confronting witnesses or evidence against him. In *Snyder* v. *Massachusetts*, 291 U. S. 97 (1934), the Court explained that a defendant has a due process right to be present at a proceeding "whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge. . . . [T]he presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." *Id.*, at 105–106, 108; see also *Faretta* v. *California*, 422 U. S. 806, 819, n. 15 (1975). The Court also cautioned in *Snyder* that the exclusion of a defendant from a trial proceeding should be considered in light of the whole record. 291 U. S., at 115.

In this case the presence of the four respondents and their four trial counsel at the *in camera* discussion was not required to ensure fundamental fairness or a "reasonably substantial . . . opportunity to defend against the charge." See *Snyder, supra.* The encounter between the judge, the juror, and Gagnon's lawyer was a short interlude in a complex trial; the conference was not the sort of event which every defendant had a right personally to attend under the Fifth Amendment. Respondents could have done nothing had they been at the conference, nor would they have gained anything by attending. *Id.*, at 108. Indeed, the presence of Gagnon and the other respondents, their four counsel, and the prosecutor could have been counterproductive. Juror Graham had quietly expressed some concern about the purposes of Gagnon's sketching, and the District Judge sought to explain the situation to the juror. The Fifth Amendment does not require that all the parties be present when the judge inquires into such a minor occurrence.

The Court of Appeals also held that the conference with the juror was a "stage of the trial" at which Gagnon's presence was guaranteed by Federal Rule of Criminal Procedure 43. We assume for the purposes of this opinion that the Court of Appeals was correct in this regard. We hold, however, that the court erred in concluding that respondents had not waived their rights under Rule 43 to be present at the conference with the juror.

The Court of Appeals found the record insufficient to show a valid waiver of respondents' rights under Rule 43 because there was no proof that respondents expressly or impliedly indicated their willingness to be absent from the conference. The record shows, however, that the District Judge, in open court, announced her intention to speak with the juror in chambers, and then called a recess. The *in camera* discussion took place during the recess, and trial resumed shortly thereafter with no change in the jury. Respondents neither then nor later in the course of the trial asserted any Rule 43 rights they may have had to attend this conference. Respondents did not request to attend the conference at any time. No objections of any sort were lodged, either before or after the conference. Respondents did not even make any post-trial motions, although post-trial hearings may often resolve this sort of claim. See Fed. Rule Crim. Proc. 33; *Rushen, supra,* at 119–120, citing *Smith* v. *Phillips,* 455 U. S. 209, 218–219 (1982); *Remmer* v. *United States,* 347 U. S. 227, 230 (1954). We disagree with the Court of Appeals that failure to object is irrelevant to whether a defendant has voluntarily absented himself under Rule 43 from an *in camera* conference of which he is aware. The district court need not get an express "on the record" waiver from the defendant for every trial conference which a defendant may have a right to attend. As we have noted previously, "[t]here is scarcely a lengthy trial in which one or more jurors does not have occasion to speak to the trial judge about something, whether it relates to a matter of personal comfort or to some aspect of the trial." *Rushen, supra,* at 118. A defendant knowing of such a discussion must assert whatever right he may have under Rule 43 to be present.

Our holding today is in accord with our prior cases and is also consistent with the approach taken by many Courts of Appeals.[2] In *Taylor* v. *United States,* 414 U. S. 17 (1973), the defendant did not return to the courthouse after the first morning of trial. The trial continued in his absence, resulting in guilty verdicts. After his later arrest and sentencing the defendant claimed that he was denied a right to be present at trial under Rule 43 because mere voluntary absence was not an effective waiver of that right. We rejected this claim, *id.*, at 19–20, and held that the defendant need not be expressly warned of rights under Rule 43. Nor did we require any type of waiver to exist on the record; the defendant's failure to assert his right was an adequate waiver. Similarly, respondents' total failure to assert their rights to attend the conference with the juror sufficed to waive their rights under Rule 43.

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[2] See, *e. g., United States* v. *Washington,* 227 U. S. App. D. C. 184, 191–193, 705 F. 2d 489, 496–498 (1983); *United States* v. *Provenzano,* 620 F. 2d 985, 997–998 (CA3), cert. denied, 449 U. S. 899 (1980); *United States* v. *Bufalino,* 576 F. 2d 446, 450–451 (CA2), cert. denied, 439 U. S. 928 (1978); *United States* v. *Brown,* 571 F. 2d 980, 987 (CA6 1978).

This analysis comports both with the language of Rule 43 and with the everyday practicalities of conducting a trial. If a defendant is entitled under Rule 43 to attend certain "stages of the trial" which do not take place in open court, the defendant or his counsel must assert that right at the time; they may not claim it for the first time on appeal from a sentence entered on a jury's verdict of "guilty." Rule 43(b) states that "the defendant shall be considered to have waived his right to be present whenever a defendant, initially present . . . voluntarily absents himself . . . ." See also Advisory Committee Notes on Fed. Rule Crim. Proc. 43, 18 U. S. C. App., p. 646. Respondents knew the District Judge was holding a conference with the juror and with Gagnon's attorney, yet neither they nor their attorney made any effort to attend. Timely invocation of a Rule 43 right could at least have apprised the District Court of the claim, and very likely enabled it to accommodate a meritorious claim in whole or in part. Unlike the Court of Appeals, we find nothing in Rule 43 which requires that latter-day protests of the District Court's action with respect to a relatively minor incident be sustained, and the case tried anew. We hold that failure by a criminal defendant to invoke his right to be present under Federal Rule of Criminal Procedure 43 at a conference which he knows is taking place between the judge and a juror in chambers constitutes a valid waiver of that right. The petition for certiorari and respondents' motion to supplement the record are granted, and the judgment of the Court of Appeals is

Reversed.

JUSTICE POWELL took no part in the consideration or decision of this case.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Last Term this Court divided sharply in a case involving an *ex parte* contact between a judge and juror during a criminal trial. *Rushen* v. *Spain*, 464 U. S. 114, (1983) *(per curiam)*. Five separate opinions issued. Two Justices urged the Court to decide the "important constitutional questions" raised by such *ex parte* juror contacts, see *id.*, at 131 (MARSHALL, J., dissenting); *id.*, at 123 (STEVENS, J., concurring in judgment), but diverged significantly in their analyses and conclusions. Compare *id.*, at 140 (MARSHALL, J., dissenting) (*ex parte* contacts implicate three constitutional rights: "the right to counsel, . . . the 'right to be present,' . . . [and] the right to an impartial jury") with *id.*, at 125 (STEVENS, J., concurring in judgment) ("[T]he mere occurrence of an *ex parte* conversation between a trial judge and a juror does not constitute a deprivation of any constitutional right"). JUSTICE BLACKMUN and I dissented, arguing that the case should be either given plenary consideration, *id.*, at 122 (BRENNAN, J., dissenting), or not reviewed at all, *id.*, at 150–153 (BLACKMUN, J., dissenting). In the face of this controversy, the bare *per curiam* majority explicitly declined to consider "[w]hether the error [of *ex parte* contact] was of constitutional dimension," *id.*, at 117–118, n. 2, and held only that any error demonstrated on the particular facts at issue was harmless. *Id.*, at 121.

Today, without so much as a nod to this recent reservation of the question, the Court decides that the odd facts of this case do not constitute "the sort of event which every defendant ha[s] a right personally to attend under the Fifth Amendment," citing the lone Member of the Court who would have so decided last Term. *Ante,* at 526–527. No guiding standard for future application is provided; the Court simply invokes its power to decide *this* case. Such ad hoc resolutions invariably engender more problems than solutions for lower courts.

Moreover, the parties directly affected by today's decision have not even been permitted an opportunity to brief and argue the merits. Given the highly fact-specific nature of the case, my preference would be to deny the petition for certiorari. But if the merits are to be addressed, I would do so only upon full consideration after briefing and oral argument. Accordingly, I respectfully dissent.

CLEVELAND BOARD OF EDUCATION *v.* LOUDERMILL ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 83-1362. Argued December 3, 1984—Decided March 19, 1985*

In No. 83-1362, petitioner Board of Education hired respondent Loudermill as a security guard. On his job application Loudermill stated that he had never been convicted of a felony. Subsequently, upon discovering that he had in fact been convicted of grand larceny, the Board dismissed him for dishonesty in filling out the job application. He was not afforded an opportunity to respond to the dishonesty charge or to challenge the dismissal. Under Ohio law, Loudermill was a "classified civil servant," and by statute, as such an employee, could be terminated only for cause and was entitled to administrative review of the dismissal. He filed an appeal with the Civil Service Commission, which, after hearings before a referee and the Commission, upheld the dismissal some nine months after the appeal had been filed. Although the Commission's decision was subject to review in the state courts, Loudermill instead filed suit in Federal District Court, alleging that the Ohio statute providing for administrative review was unconstitutional on its face because it provided no opportunity for a discharged employee to respond to charges against him prior to removal, thus depriving him of liberty and property without due process. It was also alleged that the statute was unconstitutional as applied because discharged employees were not given sufficiently prompt postremoval hearings. The District Court dismissed the suit for failure to state a claim on which relief could be granted, holding that because the very statute that created the property right in continued employment also specified the procedures for discharge, and because those procedures were followed, Loudermill was, by definition, afforded all the process due; that the post-termination hearings also adequately protected Loudermill's property interest; and that in light of the Commission's crowded docket the delay in processing his appeal was constitutionally acceptable. In No. 83-1363, petitioner Board of Education fired respondent Donnelly from his job as a bus mechanic because he had

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*Together with No. 83-1363, *Parma Board of Education* v. *Donnelly et al.*, and No. 83-6392, *Loudermill* v. *Cleveland Board of Education et al.*, also on certiorari to the same court.

failed an eye examination. He appealed to the Civil Service Commission, which ordered him reinstated, but without backpay. He then filed a complaint in Federal District Court essentially identical to Loudermill's, and the court dismissed for failure to state a claim. On a consolidated appeal, the Court of Appeals reversed in part and remanded, holding that both respondents had been deprived of due process and that the compelling private interest in retaining employment, combined with the value of presenting evidence prior to dismissal, outweighed the added administrative burden of a pretermination hearing. But with regard to the alleged deprivation of liberty and Loudermill's 9-month wait for an administrative decision, the court affirmed the District Court, finding no constitutional violation.

Held: All the process that is due is provided by a pretermination opportunity to respond, coupled with post-termination administrative procedures as provided by the Ohio statute; since respondents alleged that they had no chance to respond, the District Court erred in dismissing their complaints for failure to state a claim. Pp. 538–548.

(a) The Ohio statute plainly supports the conclusion that respondents possess property rights in continued employment. The Due Process Clause provides that the substantive rights of life, liberty, and property cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. "Property" cannot be defined by the procedures provided for its deprivation. Pp. 538–541.

(b) The principle that under the Due Process Clause an individual must be given an opportunity for a hearing *before* he is deprived of any significant property interest, requires "some kind of hearing" prior to the discharge of an employee who has a constitutionally protected property interest in his employment. The need for some form of pretermination hearing is evident from a balancing of the competing interests at stake: the private interest in retaining employment, the governmental interests in expeditious removal of unsatisfactory employees and the avoidance of administrative burdens, and the risk of an erroneous termination. Pp. 542–545.

(c) The pretermination hearing need not definitively resolve the propriety of the discharge, but should be an initial check against mistaken decisions—essentially a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action. The essential requirements of due process are notice and an opportunity to respond. Pp. 545–546.

(d) The delay in Loudermill's administrative proceedings did not constitute a separate constitutional violation. The Due Process Clause requires provision of a hearing "at a meaningful time," and here the delay stemmed in part from the thoroughness of the procedures. Pp. 546–547.

721 F. 2d 550, affirmed and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, POWELL, STEVENS, and O'CONNOR, JJ., joined, in Parts I, II, III, and IV of which BRENNAN, J., joined, and in Part II of which MARSHALL, J., joined. MARSHALL, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 548. BRENNAN, J., filed an opinion concurring in part and dissenting in part, *post*, p. 551. REHNQUIST, J., filed a dissenting opinion, *post*, p. 559.

James G. Wyman argued the cause for petitioners in Nos. 83–1362 and 83–1363 and respondents in No. 83–6392. With him on the brief for petitioner in No. 83–1362 was *Thomas C. Simiele*. *John F. Lewis* and *John T. Meredith* filed a brief for petitioner in No. 83–1363. *John D. Maddox* and *Stuart A. Freidman* filed a brief for respondents Cleveland Civil Service Commission et al. in No. 83–6392.

Robert M. Fertel, by appointment of the Court, 468 U. S. 1203, argued the cause and filed briefs for respondents in Nos. 83–1362 and 83–1363 and petitioner in No. 83–6392.†

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†Briefs of *amici curiae* urging reversal in Nos. 83–1362 and 83–1363 were filed for the State of Ohio et al. by *Anthony J. Celebrezze, Jr.*, Attorney General of Ohio, *Gene W. Holliker* and *Christine Manuelian*, Assistant Attorneys General, *Charles A. Graddick*, Attorney General of Alabama, *Robert K. Corbin*, Attorney General of Arizona, *Tany S. Hong*, Attorney General of Hawaii, *Lindley E. Pearson*, Attorney General of Indiana, *Robert T. Stephen*, Attorney General of Kansas, *Frank J. Kelley*, Attorney General of Michigan, *Hubert H. Humphrey III*, Attorney General of Minnesota, *William A. Allain*, Attorney General of Mississippi, *Michael T. Greely*, Attorney General of Montana, *Brian McKay*, Attorney General of Nevada, *Gregory H. Smith*, Attorney General of New Hampshire, *Irwin I. Kimmelman*, Attorney General of New Jersey, *Robert WeFald*, Attorney General of North Dakota, *Michael Turpen*, Attorney General of Oklahoma, *David Frohnmayer*, Attorney General of Oregon, *LeRoy S. Zimmerman*, Attorney General of Pennsylvania, *Mark V. Meierhenry*, Attorney General of South Dakota, *Bronson C. La Follette*, Attorney General of Wisconsin, and *Archie G. McClintock*, Attorney

JUSTICE WHITE delivered the opinion of the Court.

In these cases we consider what pretermination process must be accorded a public employee who can be discharged only for cause.

I

In 1979 the Cleveland Board of Education, petitioner in No. 83–1362, hired respondent James Loudermill as a security guard. On his job application, Loudermill stated that he had never been convicted of a felony. Eleven months later, as part of a routine examination of his employment records, the Board discovered that in fact Loudermill had been convicted of grand larceny in 1968. By letter dated November 3, 1980, the Board's Business Manager informed Loudermill that he had been dismissed because of his dishonesty in filling out the employment application. Loudermill was not afforded an opportunity to respond to the charge of dishonesty or to challenge his dismissal. On November 13, the Board adopted a resolution officially approving the discharge.

Under Ohio law, Loudermill was a "classified civil servant." Ohio Rev. Code Ann. § 124.11 (1984). Such employees can be terminated only for cause, and may obtain administrative review if discharged. § 124.34. Pursuant to this provision, Loudermill filed an appeal with the Cleveland Civil Service Commission on November 12. The Commission appointed a referee, who held a hearing on January 29, 1981. Loudermill argued that he had thought that his 1968 larceny conviction was for a misdemeanor rather than a felony. The referee recommended reinstatement. On July 20, 1981, the

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General of Wyoming; and for the National School Boards Association by *Gwendolyn H. Gregory* and *August W. Steinhilber*.

Briefs of *amici curiae* urging affirmance in Nos. 83–1362 and 83–1363 were filed for the American Civil Liberties Union of Cleveland Foundation by *Gordon J. Beggs*, *Edward R. Stege, Jr.*, and *Charles S. Sims;* for the American Federation of State, County, and Municipal Employees, AFL–CIO, by *Richard Kirschner;* and for the National Educational Association by *Robert H. Chanin* and *Michael H. Gottesman*.

full Commission heard argument and orally announced that it would uphold the dismissal. Proposed findings of fact and conclusions of law followed on August 10, and Loudermill's attorneys were advised of the result by mail on August 21.

Although the Commission's decision was subject to judicial review in the state courts, Loudermill instead brought the present suit in the Federal District Court for the Northern District of Ohio. The complaint alleged that § 124.34 was unconstitutional on its face because it did not provide the employee an opportunity to respond to the charges against him prior to removal. As a result, discharged employees were deprived of liberty and property without due process. The complaint also alleged that the provision was unconstitutional as applied because discharged employees were not given sufficiently prompt postremoval hearings.

Before a responsive pleading was filed, the District Court dismissed for failure to state a claim on which relief could be granted. See Fed. Rule Civ. Proc. 12(b)(6). It held that because the very statute that created the property right in continued employment also specified the procedures for discharge, and because those procedures were followed, Loudermill was, by definition, afforded all the process due. The post-termination hearing also adequately protected Loudermill's liberty interests. Finally, the District Court concluded that, in light of the Commission's crowded docket, the delay in processing Loudermill's administrative appeal was constitutionally acceptable. App. to Pet. for Cert. in No. 83–1362, pp. A36–A42.

The other case before us arises on similar facts and followed a similar course. Respondent Richard Donnelly was a bus mechanic for the Parma Board of Education. In August 1977, Donnelly was fired because he had failed an eye examination. He was offered a chance to retake the examination but did not do so. Like Loudermill, Donnelly appealed to the Civil Service Commission. After a year of wrangling about the timeliness of his appeal, the Commission heard the case. It ordered Donnelly reinstated, though without backpay.[1] In a complaint essentially identical to Loudermill's, Donnelly challenged the constitutionality of the dismissal procedures. The District Court dismissed for failure to state a claim, relying on its opinion in *Loudermill.*

The District Court denied a joint motion to alter or amend its judgment,[2] and the cases were consolidated for appeal. A divided panel of the Court of Appeals for the Sixth Circuit reversed in part and remanded. 721 F. 2d 550 (1983). After rejecting arguments that the actions were barred by failure to exhaust administrative remedies and by res judicata—arguments that are not renewed here—the Court of Appeals found that both respondents had been deprived of due process. It disagreed with the District Court's original rationale. Instead, it concluded that the compelling private interest in retaining employment, combined with the value of presenting evidence prior to dismissal, outweighed the added administrative burden of a pretermination hearing. *Id.*, at 561–562. With regard to the alleged deprivation of liberty, and Loudermill's 9-month wait for an administrative decision, the court affirmed the District Court, finding no constitutional violation. *Id.*, at 563–564.

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[1] The statute authorizes the Commission to "affirm, disaffirm, or modify the judgment of the appointing authority." Ohio Rev. Code Ann. § 124.34 (1984). Petitioner Parma Board of Education interprets this as authority to reinstate with or without backpay and views the Commission's decision as a compromise. Brief for Petitioner in No. 83–1363, p. 6, n. 3; Tr. of Oral. Arg. 14. The Court of Appeals, however, stated that the Commission lacked the power to award backpay. 721 F. 2d 550, 554, n. 3 (1983). As the decision of the Commission is not in the record, we are unable to determine the reasoning behind it.

[2] In denying the motion, the District Court no longer relied on the principle that the state legislature could define the necessary procedures in the course of creating the property right. Instead, it reached the same result under a balancing test based on JUSTICE POWELL's concurring opinion in *Arnett* v. *Kennedy*, 416 U. S. 134, 168–169 (1974), and the Court's opinion in *Mathews* v. *Eldridge*, 424 U. S. 319 (1976). App. to Pet. for Cert. in No. 83–1362, pp. A54–A57.

The dissenting judge argued that respondents' property interests were conditioned by the procedural limitations accompanying the grant thereof. He considered constitutional requirements satisfied because there was a reliable pretermination finding of "cause," coupled with a due process hearing at a meaningful time and in a meaningful manner. *Id.*, at 566.

Both employers petitioned for certiorari. Nos. 83–1362 and 83–1363. In a cross-petition, Loudermill sought review of the rulings adverse to him. No. 83–6392. We granted all three petitions, 467 U. S. 1204 (1984), and now affirm in all respects.

II

Respondents' federal constitutional claim depends on their having had a property right in continued employment.[3] *Board of Regents* v. *Roth*, 408 U. S. 564, 576–578 (1972); *Reagan* v. *United States*, 182 U. S. 419, 425 (1901). If they did, the State could not deprive them of this property without due process. See *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U. S. 1, 11–12 (1978); *Goss* v. *Lopez*, 419 U. S. 565, 573–574 (1975).

Property interests are not created by the Constitution, "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . ." *Board of Regents* v. *Roth, supra*, at 577. See also *Paul* v. *Davis*, 424 U. S. 693, 709 (1976). The Ohio statute plainly creates such an interest. Respondents were "classified civil service employees," Ohio Rev. Code Ann. § 124.11 (1984), entitled to retain their positions "during good behavior and efficient service," who could not be dismissed "except . . . for . . . misfeasance, malfeasance, or nonfeasance in office," § 124.34.[4] The statute plainly supports the conclusion, reached by both lower courts, that respondents possessed property rights in continued employment. Indeed, this question does not seem to have been disputed below.[5]

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[3] Of course, the Due Process Clause also protects interests of life and liberty. The Court of Appeals' finding of a constitutional violation was based solely on the deprivation of a property interest. We address below Loudermill's contention that he has been unconstitutionally deprived of liberty. See n. 13, *infra*.

The Parma Board argues, however, that the property right is defined by, and conditioned on, the legislature's choice of procedures for its deprivation. Brief for Petitioner in No. 83–1363, pp. 26–27. The Board stresses that in addition to specifying the grounds for termination, the statute sets out procedures by which termination may take place.[6] The procedures were adhered to in these cases. According to petitioner, "[t]o require additional procedures would in effect expand the scope of the property interest itself." *Id.*, at 27. See also Brief for State of Ohio et al. as *Amici Curiae* 5–10.

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[4] The relevant portion of § 124.34 provides that no classified civil servant may be removed except "for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of such sections or the rules of the director of administrative services or the commission, or any other failure of good behavior, or any other acts of misfeasance, malfeasance, or nonfeasance in office."

[5] The Cleveland Board of Education now asserts that Loudermill had no property right under state law because he obtained his employment by lying on the application. It argues that had Loudermill answered truthfully he would not have been hired. He therefore lacked a "legitimate claim of entitlement" to the position. Brief for Petitioner in No. 83–1362, pp. 14–15.

For several reasons, we must reject this submission. First, it was not raised below. Second, it makes factual assumptions—that Loudermill lied, and that he would not have been hired had he not done so—that are inconsistent with the allegations of the complaint and inappropriate at this stage of the litigation, which has not proceeded past the initial pleadings stage. Finally, the argument relies on a retrospective fiction inconsistent with the undisputed fact that Loudermill was hired and did hold the security guard job. The Board cannot escape its constitutional obligations by rephrasing the basis for termination as a reason why Loudermill should not have been hired in the first place.

[6] After providing for dismissal only for cause, see n. 4, *supra*, § 124.34 states that the dismissed employee is to be provided with a copy of the order of removal giving the reasons therefor. Within 10 days of the filing of the order with the Director of Administrative Services, the employee may file a written appeal with the State Personnel Board of Review or the Commission. "In the event such an appeal is filed, the board or commis-

This argument, which was accepted by the District Court, has its genesis in the plurality opinion in *Arnett* v. *Kennedy*, 416 U. S. 134 (1974). *Arnett* involved a challenge by a former federal employee to the procedures by which he was dismissed. The plurality reasoned that where the legislation conferring the substantive right also sets out the procedural mechanism for enforcing that right, the two cannot be separated:

> "The employee's statutorily defined right is not a guarantee against removal without cause in the abstract, but such a guarantee as enforced by the procedures which Congress has designated for the determination of cause.
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> . . . . .
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> "[W]here the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant in the position of appellee must take the bitter with the sweet." *Id.*, at 152–154.

This view garnered three votes in *Arnett*, but was specifically rejected by the other six Justices. See *id.*, at 166–167 (POWELL, J., joined by BLACKMUN, J.,); *id.*, at 177–178, 185 (WHITE, J.,); *id.*, at 211 (MARSHALL, J., joined by Douglas and BRENNAN, JJ.). Since then, this theory has at times seemed to gather some additional support. See *Bishop* v. *Wood*, 426 U. S. 341, 355–361 (1976) (WHITE, J., dissenting); *Goss* v. *Lopez*, 419 U. S., at 586–587 (POWELL, J., joined

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sion shall forthwith notify the appointing authority and shall hear, or appoint a trial board to hear, such appeal within thirty days from and after its filing with the board or commission, and it may affirm, disaffirm, or modify the judgment of the appointing authority." Either side may obtain review of the Commission's decision in the State Court of Common Pleas.

by BURGER, C. J., and BLACKMUN and REHNQUIST, JJ., dissenting). More recently, however, the Court has clearly rejected it. In *Vitek* v. *Jones*, 445 U. S. 480, 491 (1980), we pointed out that "minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action." This conclusion was reiterated in *Logan* v. *Zimmerman Brush Co.*, 455 U. S. 422, 432 (1982), where we reversed the lower court's holding that because the entitlement arose from a state statute, the legislature had the prerogative to define the procedures to be followed to protect that entitlement.

In light of these holdings, it is settled that the "bitter with the sweet" approach misconceives the constitutional guarantee. If a clearer holding is needed, we provide it today. The point is straightforward: the Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology. "Property" cannot be defined by the procedures provided for its deprivation any more than can life or liberty. The right to due process "is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards." *Arnett* v. *Kennedy*, *supra*, at 167 (POWELL, J., concurring in part and concurring in result in part); see *id.*, at 185 (WHITE, J., concurring in part and dissenting in part).

In short, once it is determined that the Due Process Clause applies, "the question remains what process is due." *Morrissey* v. *Brewer*, 408 U. S. 471, 481 (1972). The answer to that question is not to be found in the Ohio statute.

III

An essential principle of due process is that a deprivation of life, liberty, or property "be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, 313 (1950). We have described "the root requirement" of the Due Process Clause as being "that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest."[7] *Boddie* v. *Connecticut*, 401 U. S. 371, 379 (1971) (emphasis in original); see *Bell* v. *Burson*, 402 U. S. 535, 542 (1971). This principle requires "some kind of a hearing" prior to the discharge of an employee who has a constitutionally protected property interest in his employment. *Board of Regents* v. *Roth*, 408 U. S., at 569–570; *Perry* v. *Sindermann*, 408 U. S. 593, 599 (1972). As we pointed out last Term, this rule has been settled for some time now. *Davis* v. *Scherer*, 468 U. S. 183, 192, n. 10 (1984); *id.*, at 200–203 (BRENNAN, J., concurring in part and dissenting in part). Even decisions finding no constitutional violation in termination procedures have relied on the existence of some pretermination opportunity to respond. For example, in *Arnett* six Justices found constitutional minima satisfied where the employee had access to the material upon which the charge was based and could respond orally and in writing and present rebuttal affidavits. See also *Barry* v. *Barchi*, 443 U. S. 55, 65 (1979) (no due process violation where horse trainer whose license was suspended "was given more than one opportunity to present his side of the story").

The need for some form of pretermination hearing, recognized in these cases, is evident from a balancing of the competing interests at stake. These are the private interest in retaining employment, the governmental interest in the expeditious removal of unsatisfactory employees and the avoidance of administrative burdens, and the risk of an erroneous termination. See *Mathews* v. *Eldridge*, 424 U. S. 319, 335 (1976).

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[7] There are, of course, some situations in which a postdeprivation hearing will satisfy due process requirements. See *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U. S. 594 (1950); *North American Cold Storage Co.* v. *Chicago*, 211 U. S. 306 (1908).

First, the significance of the private interest in retaining employment cannot be gainsaid. We have frequently recognized the severity of depriving a person of the means of livelihood. See *Fusari* v. *Steinberg*, 419 U. S. 379, 389 (1975); *Bell* v. *Burson*, *supra*, at 539; *Goldberg* v. *Kelly*, 397 U. S. 254, 264 (1970); *Sniadach* v. *Family Finance Corp.*, 395 U. S. 337, 340 (1969). While a fired worker may find employment elsewhere, doing so will take some time and is likely to be burdened by the questionable circumstances under which he left his previous job. See *Lefkowitz* v. *Turley*, 414 U. S. 70, 83–84 (1973).

Second, some opportunity for the employee to present his side of the case is recurringly of obvious value in reaching an accurate decision. Dismissals for cause will often involve factual disputes. Cf. *Califano* v. *Yamasaki*, 442 U. S. 682, 686 (1979). Even where the facts are clear, the appropriateness or necessity of the discharge may not be; in such cases, the only meaningful opportunity to invoke the discretion of the decisionmaker is likely to be before the termination takes effect. See *Goss* v. *Lopez*, 419 U. S., at 583–584; *Gagnon* v. *Scarpelli*, 411 U. S. 778, 784–786 (1973).[8]

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[8] This is not to say that where state conduct is entirely discretionary the Due Process Clause is brought into play. See *Meachum* v. *Fano*, 427 U. S. 215, 228 (1976). Nor is it to say that a person can insist on a hearing in order to argue that the decisionmaker should be lenient and depart from legal requirements. See *Dixon* v. *Love*, 431 U. S. 105, 114 (1977). The point is that where there is an entitlement, a prior hearing facilitates the consideration of whether a permissible course of action is also an appropriate one. This is one way in which providing "effective notice and informal hearing permitting the [employee] to give his version of the events will provide a meaningful hedge against erroneous action. At least the [employer] will be alerted to the existence of disputes about facts and

The cases before us illustrate these considerations. Both respondents had plausible arguments to make that might have prevented their discharge. The fact that the Commission saw fit to reinstate Donnelly suggests that an error might have been avoided had he been provided an opportunity to make his case to the Board. As for Loudermill, given the Commission's ruling we cannot say that the discharge was mistaken. Nonetheless, in light of the referee's recommendation, neither can we say that a fully informed decisionmaker might not have exercised its discretion and decided not to dismiss him, notwithstanding its authority to do so. In any event, the termination involved arguable issues,[9] and the right to a hearing does not depend on a demonstration of certain success. *Carey* v. *Piphus*, 435 U. S. 247, 266 (1978).

The governmental interest in immediate termination does not outweigh these interests. As we shall explain, affording the employee an opportunity to respond prior to termination would impose neither a significant administrative burden nor intolerable delays. Furthermore, the employer shares the employee's interest in avoiding disruption and erroneous decisions; and until the matter is settled, the employer would continue to receive the benefit of the employee's labors. It is preferable to keep a qualified employee on than to train a new one. A governmental employer also has an interest in keeping citizens usefully employed rather than taking the possibly erroneous and counterproductive step of forcing its employees onto the welfare rolls. Finally, in those situations where the employer perceives a significant hazard in

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arguments about cause and effect. . . . [H]is discretion will be more informed and we think the risk of error substantially reduced." *Goss* v. *Lopez*, 419 U. S., at 583–584.

[9] Loudermill's dismissal turned not on the objective fact that he was an ex-felon or the inaccuracy of his statement to the contrary, but on the subjective question whether he had lied on his application form. His explanation for the false statement is plausible in light of the fact that he received only a suspended 6-month sentence and a fine on the grand larceny conviction. Tr. of Oral Arg. 35.

keeping the employee on the job,[10] it can avoid the problem by suspending with pay.

IV

The foregoing considerations indicate that the pretermination "hearing," though necessary, need not be elaborate. We have pointed out that "[t]he formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings." *Boddie* v. *Connecticut*, 401 U. S., at 378. See *Cafeteria Workers* v. *McElroy*, 367 U. S. 886, 894–895 (1961). In general, "something less" than a full evidentiary hearing is sufficient prior to adverse administrative action. *Mathews* v. *Eldridge*, 424 U. S., at 343. Under state law, respondents were later entitled to a full administrative hearing and judicial review. The only question is what steps were required before the termination took effect.

In only one case, *Goldberg* v. *Kelly*, 397 U. S. 254 (1970), has the Court required a full adversarial evidentiary hearing prior to adverse governmental action. However, as the *Goldberg* Court itself pointed out, see *id.*, at 264, that case presented significantly different considerations than are present in the context of public employment. Here, the pretermination hearing need not definitively resolve the propriety of the discharge. It should be an initial check against mistaken decisions—essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action. See *Bell* v. *Burson*, 402 U. S., at 540.

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[10] In the cases before us, no such danger seems to have existed. The examination Donnelly failed was related to driving school buses, not repairing them. *Id.*, at 39–40. As the Court of Appeals stated, "[n]o emergency was even conceivable with respect to Donnelly." 721 F. 2d, at 562. As for Loudermill, petitioner states that "to find that we have a person who is an ex-felon as our security guard is very distressful to us." Tr. of Oral Arg. 19. But the termination was based on the presumed misrepresentation on the employment form, not on the felony conviction. In fact, Ohio law provides that an employee "shall not be disciplined for acts," including criminal convictions, occurring more than two years previously. See Ohio Admin. Code § 124–3–04 (1979). Petitioner concedes that Loudermill's job performance was fully satisfactory.

The essential requirements of due process, and all that respondents seek or the Court of Appeals required, are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement. See Friendly, "Some Kind of Hearing," 123 U. Pa. L. Rev. 1267, 1281 (1975). The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. See *Arnett* v. *Kennedy*, 416 U. S., at 170–171 (opinion of POWELL, J.); *id.*, at 195–196 (opinion of WHITE, J.); see also *Goss* v. *Lopez*, 419 U. S., at 581. To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee.

V

Our holding rests in part on the provisions in Ohio law for a full post-termination hearing. In his cross-petition Loudermill asserts, as a separate constitutional violation, that his administrative proceedings took too long.[11] The Court of

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[11] Loudermill's hearing before the referee occurred two and one-half months after he filed his appeal. The Commission issued its written decision six and one-half months after that. Administrative proceedings in Donnelly's case, once it was determined that they could proceed at all, were swifter. A writ of mandamus requiring the Commission to hold a hearing was issued on May 9, 1978; the hearing took place on May 30; the order of reinstatement was issued on July 6.

Section 124.34 provides that a hearing is to be held within 30 days of the appeal, though the Ohio courts have ruled that the time limit is not mandatory. *E. g.*, *In re Bronkar*, 53 Ohio Misc. 13, 17, 372 N. E. 2d 1345, 1347 (Com. Pl. 1977). The statute does not provide a time limit for the actual decision.

Appeals held otherwise, and we agree.[12] The Due Process Clause requires provision of a hearing "at a meaningful time." *E. g.*, *Armstrong* v. *Manzo*, 380 U. S. 545, 552 (1965). At some point, a delay in the post-termination hearing would become a constitutional violation. See *Barry* v. *Barchi*, 443 U. S., at 66. In the present case, however, the complaint merely recites the course of proceedings and concludes that the denial of a "speedy resolution" violated due process. App. 10. This reveals nothing about the delay except that it stemmed in part from the thoroughness of the procedures. A 9-month adjudication is not, of course, unconstitutionally lengthy *per se*. Yet Loudermill offers no indication that his wait was unreasonably prolonged other than the fact that it took nine months. The chronology of the proceedings set out in the complaint, coupled with the assertion that nine months is too long to wait, does not state a claim of a constitutional deprivation.[13]

VI

We conclude that all the process that is due is provided by a pretermination opportunity to respond, coupled with post-termination administrative procedures as provided by the Ohio statute. Because respondents allege in their complaints that they had no chance to respond, the District Court erred in dismissing for failure to state a claim. The judgment of the Court of Appeals is affirmed, and the case is remanded for further proceedings consistent with this opinion.

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[12] It might be argued that once we find a due process violation in the denial of a pretermination hearing we need not and should not consider whether the post-termination procedures were adequate. See *Barry* v. *Barchi*, 443 U. S. 55, 72–74 (1979) (BRENNAN, J., concurring in part). We conclude that it is appropriate to consider this issue, however, for three reasons. First, the allegation of a distinct due process violation in the administrative delay is not an alternative theory supporting the same relief, but a separate claim altogether. Second, it was decided by the court below and is raised in the cross-petition. Finally, the existence of post-termination procedures is relevant to the necessary scope of pretermination procedures.

[13] The cross-petition also argues that Loudermill was unconstitutionally deprived of liberty because of the accusation of dishonesty that hung over his head during the administrative proceedings. As the Court of Appeals found, 721 F. 2d, at 563, n. 18, the failure to allege that the reasons for the dismissal were published dooms this claim. See *Bishop* v. *Wood*, 426 U. S. 341, 348 (1976).

So ordered.

JUSTICE MARSHALL, concurring in part and concurring in the judgment.

I agree wholeheartedly with the Court's express rejection of the theory of due process, urged upon us by the petitioner Boards of Education, that a public employee who may be discharged only for cause may be discharged by whatever procedures the legislature chooses. I therefore join Part II of the opinion for the Court. I also agree that, before discharge, the respondent employees were entitled to the opportunity to respond to the charges against them (which is all they requested), and that the failure to accord them that opportunity was a violation of their constitutional rights. Because the Court holds that the respondents were due all the process they requested, I concur in the judgment of the Court.

I write separately, however, to reaffirm my belief that public employees who may be discharged only for cause are entitled, under the Due Process Clause of the Fourteenth Amendment, to more than respondents sought in this case. I continue to believe that *before the decision is made to terminate an employee's wages*, the employee is entitled to an opportunity to test the strength of the evidence "by confronting and cross-examining adverse witnesses and by presenting witnesses on his own behalf, whenever there are substantial disputes in testimonial evidence," *Arnett* v. *Kennedy*, 416 U. S. 134, 214 (1974) (MARSHALL, J., dissenting). Because the Court suggests that even in this situation due process requires no more than notice and an opportunity to be heard before wages are cut off, I am not able to join the Court's opinion in its entirety.

To my mind, the disruption caused by a loss of wages may be so devastating to an employee that, whenever there are substantial disputes about the evidence, additional predeprivation procedures are necessary to minimize the risk of an erroneous termination. That is, I place significantly greater weight than does the Court on the public employee's substantial interest in the accuracy of the pretermination proceeding. After wage termination, the employee often must wait months before his case is finally resolved, during which time he is without wages from his public employment. By limiting the procedures due prior to termination of wages, the Court accepts an impermissibly high risk that a wrongfully discharged employee will be subjected to this often lengthy wait for vindication, and to the attendant and often traumatic disruptions to his personal and economic life.

Considerable amounts of time may pass between the termination of wages and the decision in a post-termination evidentiary hearing—indeed, in this case nine months passed before Loudermill received a decision from his postdeprivation hearing. During this period the employee is left in limbo, deprived of his livelihood and of wages on which he may well depend for basic sustenance. In that time, his ability to secure another job might be hindered, either because of the nature of the charges against him, or because of the prospect that he will return to his prior public employment if permitted. Similarly, his access to unemployment benefits might seriously be constrained, because many States deny unemployment compensation to workers discharged for cause.* Absent an interim source of wages, the employee might be unable to meet his basic, fixed costs, such as food, rent or mortgage payments. He would be forced to spend his savings, if he had any, and to convert his possessions to

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*See U. S. Dept. of Labor, Comparison of State Unemployment Insurance Laws §§425, 435 (1984); see also *id.*, at 4–33 to 4–36 (table of state rules governing disqualification from benefits for discharge for misconduct).

cash before becoming eligible for public assistance. Even in that instance

> "[t]he substitution of a meager welfare grant for a regular paycheck may bring with it painful and irremediable personal as well as financial dislocations. A child's education may be interrupted, a family's home lost, a person's relationship with his friends and even his family may be irrevocably affected. The costs of being forced, even temporarily, onto the welfare rolls because of a wrongful discharge from tenured Government employment cannot be so easily discounted," *id.*, at 221.

Moreover, it is in no respect certain that a prompt postdeprivation hearing will make the employee economically whole again, and the wrongfully discharged employee will almost inevitably suffer irreparable injury. Even if reinstatement is forthcoming, the same might not be true of backpay—as it was not to respondent Donnelly in this case—and the delay in receipt of wages would thereby be transformed into a permanent deprivation. Of perhaps equal concern, the personal trauma experienced during the long months in which the employee awaits decision, during which he suffers doubt, humiliation, and the loss of an opportunity to perform work, will never be recompensed, and indeed probably could not be with dollars alone.

That these disruptions might fall upon a justifiably discharged employee is unfortunate; that they might fall upon a wrongfully discharged employee is simply unacceptable. Yet in requiring only that the employee have an opportunity to respond before his wages are cut off, without affording him any meaningful chance to present a defense, the Court is willing to accept an impermissibly high risk of error with respect to a deprivation that is substantial.

Were there any guarantee that the postdeprivation hearing and ruling would occur promptly, such as within a few days of the termination of wages, then this minimal predeprivation process might suffice. But there is no such guarantee. On a practical level, if the employer had to pay the employee until the end of the proceeding, the employer obviously would have an incentive to resolve the issue expeditiously. The employer loses this incentive if the only suffering as a result of the delay is borne by the wage earner, who eagerly awaits the decision on his livelihood. Nor has this Court grounded any guarantee of this kind in the Constitution. Indeed, this Court has in the past approved, at least implicitly, an average 10- or 11-month delay in the receipt of a decision on Social Security benefits, *Mathews* v. *Eldridge*, 424 U. S. 319, 341–342 (1976), and, in the case of respondent Loudermill, the Court gives a stamp of approval to a process that took nine months. The hardship inevitably increases as the days go by, but nevertheless the Court countenances such delay. The adequacy of the predeprivation and postdeprivation procedures are inevitably intertwined, and only a constitutional guarantee that the latter will be immediate and complete might alleviate my concern about the possibility of a wrongful termination of wages.

The opinion for the Court does not confront this reality. I cannot and will not close my eyes today—as I could not 10 years ago—to the economic situation of great numbers of public employees, and to the potentially traumatic effect of a wrongful discharge on a working person. Given that so very much is at stake, I am unable to accept the Court's narrow view of the process due to a public employee before his wages are terminated, and before he begins the long wait for a public agency to issue a final decision in his case.

JUSTICE BRENNAN, concurring in part and dissenting in part.

Today the Court puts to rest any remaining debate over whether public employers must provide meaningful notice and hearing procedures before discharging an employee for cause. As the Court convincingly demonstrates, the employee's right to fair notice and an opportunity to "present his side of the story" before discharge is not a matter of legislative grace, but of "constitutional guarantee." *Ante*, at 541, 546. This principle, reaffirmed by the Court today, has been clearly discernible in our "repeated pronouncements" for many years. See *Davis* v. *Scherer*, 468 U. S. 183, 203 (1984) (BRENNAN, J., concurring in part and dissenting in part).

Accordingly, I concur in Parts I–IV of the Court's opinion. I write separately to comment on two issues the Court does not resolve today, and to explain my dissent from the result in Part V of the Court's opinion.

I

First, the Court today does not prescribe the precise form of required pretermination procedures in cases where an employee disputes the *facts* proffered to support his discharge. The cases at hand involve, as the Court recognizes, employees who did not dispute the facts but had "plausible arguments to make that might have prevented their discharge." *Ante*, at 544. In such cases, notice and an "opportunity to present reasons," *ante*, at 546, are sufficient to protect the important interests at stake.

As the Court also correctly notes, other cases "will often involve factual disputes," *ante*, at 543, such as allegedly erroneous records or false accusations. As JUSTICE MARSHALL has previously noted and stresses again today, *ante*, at 548, where there exist not just plausible arguments to be made, but also "substantial disputes in testimonial evidence," due process may well require more than a simple opportunity to argue or deny. *Arnett* v. *Kennedy*, 416 U. S. 134, 214 (1974) (MARSHALL, J., dissenting). The Court acknowledges that what the Constitution requires prior to discharge, in general terms, is pretermination procedures sufficient to provide "an initial check against mistaken decisions—essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are *true* and support the proposed action." *Ante*, at 545–546 (emphasis added). When factual disputes are involved, therefore, an employee may deserve a fair opportunity before discharge to produce contrary records or testimony, or even to confront an accuser in front of the decisionmaker. Such an opportunity might not necessitate "elaborate" procedures, see *ante*, at 545, but the fact remains that in some cases only such an oppportunity to challenge the source or produce contrary evidence will suffice to support a finding that there are "reasonable grounds" to believe accusations are "true."

Factual disputes are not involved in these cases, however, and the "very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria Workers* v. *McElroy*, 367 U. S. 886, 895 (1961). I do not understand Part IV to foreclose the views expressed above or by JUSTICE MARSHALL, *ante*, p. 548, with respect to discharges based on disputed evidence or testimony. I therefore join Parts I–IV of the Court's opinion.

II

The second issue not resolved today is that of administrative delay. In holding that Loudermill's administrative proceedings did not take too long, the Court plainly does *not* state a flat rule that 9-month delays in deciding discharge appeals will pass constitutional scrutiny as a matter of course. To the contrary, the Court notes that a full post-termination hearing and decision must be provided at "a meaningful time" and that "[a]t some point, a delay in the post-termination hearing would become a constitutional violation." *Ante*, at 547. For example, in *Barry* v. *Barchi*, 443 U. S. 55 (1979), we disapproved as "constitutionally infirm" the shorter administrative delays that resulted under a statute that required "prompt" postsuspension hearings for suspended racehorse trainers with decision to follow within 30 days of the hearing. *Id.*, at 61, 66. As JUSTICE MARSHALL demonstrates, when an employee's wages are terminated pending administrative decision, "hardship inevitably increases as the days go by." *Ante*, at 551; see also *Arnett* v. *Kennedy*, *supra*, at 194 (WHITE, J., concurring in part and dissenting in part) ("The impact on the employee of being without a job pending a full hearing is likely to be considerable because '[m]ore than 75 percent of actions contested within employing agencies require longer to decide than the 60 days required by . . . regulations'") (citation omitted). In such cases the Constitution itself draws a line, as the Court declares, "at some point" beyond which the State may not continue a deprivation absent decision.[1] The holding in Part V is merely that, in this particular case, Loudermill failed to allege facts sufficient to state a cause of action, and not that nine months can never exceed constitutional limits.

III

Recognizing the limited scope of the holding in Part V, I must still dissent from its result, because the record in this case is insufficiently developed to permit an informed judgment on the issue of overlong delay. Loudermill's complaint was dismissed without answer from the respondent Cleveland Civil Service Commission. Allegations at this early stage are to be liberally construed, and "[i]t is axiomatic that a complaint should not be dimissed unless 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *McLain* v. *Real Estate Bd. of New Orleans, Inc.*, 444 U. S. 232, 246 (1980) (citation omitted). Loudermill alleged that it took the Commission over two and one-half months simply to hold a hearing in his case, over two months *more* to issue a nonbinding interim decision, and more than three and one-half months after *that* to deliver a final decision. Complaint ¶¶20, 21, App. 10.[2] The Commission provided no explanation for these significant gaps in the administrative process; we do not know if they were due to an overabundance of appeals, Loudermill's own foot-dragging, bad faith on the part of the Commission, or any other of a variety of reasons that might affect our analysis. We do know, however, that under Ohio law the Commission is obligated to hear appeals like Loudermill's "within thirty days." Ohio Rev. Code Ann. § 124.34 (1984).[3] Although this statutory limit has been viewed only as "directory" by Ohio courts, those courts have also made it clear that when the limit is exceeded, "[t]he burden of proof [is] placed on the [Commission] to illustrate to the court that the failure to comply with the 30-day requirement . . . was reasonable." *In re Bronkar*, 53 Ohio Misc. 13, 17, 372 N. E. 2d 1345, 1347 (Com. Pl. 1977). I cannot conclude on this record that Loudermill could prove "no set of facts" that might have entitled him to relief after nine months of waiting.

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[1] Post-termination administrative procedures designed to determine fully and accurately the correctness of discharge actions are to be encouraged. Multiple layers of administrative procedure, however, may not be created merely to smother a discharged employee with "thoroughness," effectively destroying his constitutionally protected interests by overextension. Cf. *ante*, at 547 ("thoroughness" of procedures partially explains delay in this case).

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[2] The interim decision, issued by a hearing examiner, was in Loudermill's favor and recommended his reinstatement. But Loudermill was not reinstated nor were his wages even temporarily restored; in fact, there apparently exists no provision for such interim relief or restoration of backpay under Ohio's statutory scheme. See *ante*, at 537, n. 1; cf. *Arnett* v. *Kennedy*, 416 U. S. 134, 196 (1974) (WHITE, J., concurring in part and dissenting in part) (under federal civil service law, discharged employee's wages are only "provisionally cut off" pending appeal); *id.*, at 146 (opinion of REHNQUIST, J.) (under federal system, backpay is automatically refunded "if the [discharged] employee is reinstated on appeal"). See also N. Y. Civ. Serv. Law § 75(3) (McKinney 1983) (suspension without pay pending determination of removal charges may not exceed 30 days). Moreover, the final decision of the Commission to reverse the hearing examiner apparently was arrived at without any additional evidentiary development; only further argument was had before the Commission. 721 F. 2d 550, 553 (CA6 1983). These undisputed facts lead me at least to question the administrative value of, and justification for, the 9-month period it took to decide Loudermill's case.

[3] A number of other States similarly have specified time limits for hearings and decisions on discharge appeals taken by tenured public employees, indicating legislative consensus that a month or two normally is sufficient time to resolve such actions. No state statutes permit administrative delays of the length alleged by Loudermill. See, *e. g.*, Ariz. Rev. Stat. Ann. § 41-785(A), (C) (Supp. 1984-1985) (hearing within 30 days, decisio within 30 days of hearing); Colo. Rev. Stat. § 24-50-125(4) (Supp. 1984) (hearing within 45 days, decision within 45 days of hearing); Conn. Gen. Stat. Ann. § 5-202(b) (Supp. 1984) (decision within 60 days of hearing);

Ill. Rev. Stat., ch. 24½, ¶ 38b14 (1983) (hearing within 45 days); Ind. Code § 4-15-2-35 (1982) (decision within 30 days of hearing); Iowa Code § 19A.14 (1983) (hearing within 30 days); Kan. Stat. Ann. § 75-2949(f) (Supp. 1983) (hearing within 45 days); Ky. Rev. Stat. § 18A.095(3) (1984) (hearing within 60 days of filing, decision within 90 days of filing); Maine Rev. Stat. Ann., Tit. 5, § 753(5) (1979) (decision within 30 days of hearing); Md. Ann. Code, Art. 64A, §§ 33(b)(2), (e) (Supp. 1984) (salary suspension hearing within 5 days and decision within 5 more days; discharge hearing within 90 days and decision within 45 days of hearing); Mass. Gen. Laws Ann., ch. 31, § 43 (Supp. 1984-1985) (hearing within 10 days, findings "forthwith," decision within 30 days of findings); Minn. Stat. § 44.08 (1970) (hearing within 10 days, decision within 3 days of hearing); Nev. Rev. Stat. § 284.390(2) (1983) (hearing within 20 days); N. J. Stat. Ann. §§ 11:15-4, 11:15-6 (West 1976) (hearing within 30 days, decision within 15 days of hearing); Okla. Stat., Tit. 74, §§ 841.13, 841.13A (Supp. 1984) (hearing within 35 days, decision within 15 days of hearing); R. I. Gen. Laws §§ 36-4-40, 36-4-40.2, 36-4-41 (1984) (initial hearing within 14 days, interim decision within 20 days of hearing, appeal decision within 30 more days, final decision of Governor within 15 more days); S. C. Code §§ 8-17-330, 8-17-340 (Supp. 1984) (interim decision within 45 days of filing, final decision within 20 days of hearing); Utah Code Ann. § 67-19-25 (Supp. 1983) (interim decision within 5-20 days, final hearing within 30 days of filing final appeal, final decision within 40 days of hearing); Wash. Rev. Code § 41.64.100 (1983) (final decision within 90 days of filing); Wis. Stat. § 230.44(4)(f) (Supp. 1984-1985) (decision within 90 days of hearing); see also Ala. Code § 36-26-27(b) (Supp. 1984) (hearings on citizen removal petitions within 20 days of service); D. C. Code § 1-617.3(a)(1)(D) (1981) ("Career and Educational Services" employees "entitled" to decision within 45 days); Ga. Code Ann. § 45-20-9(e)(1) (1982) (hearing officer's decision required within 30 days of hearing); Miss. Code Ann. § 21-31-23 (Supp. 1984) (hearing required within 20 days of termination for "extraordinary circumstances").

The Court previously has recognized that constitutional restraints on the timing, no less than the form, of a hearing and decision "will depend on appropriate accommodation of the competing interests involved." *Goss* v. *Lopez*, 419 U. S. 565, 579 (1975). The relevant interests have generally been recognized as threefold: "the importance of the private interest and the length or finality of the deprivation, the likelihood of governmental error, and the magnitude of the governmental interests involved." *Logan* v. *Zimmerman Brush Co.*, 455 U. S. 422, 434 (1982) (citations omitted); accord, *Mathews* v. *Eldridge*, 424 U. S. 319, 334–335 (1976); cf. *United States* v. *$8,850*, 461 U. S. 555, 564 (1983) (four-factor test for evaluating constitutionality of delay between time of property seizure and initiation of forfeiture action). "Little can be said on when a delay becomes presumptively improper, for the determination necessarily depends on the facts of the particular case." *Id.*, at 565.

Thus the constitutional analysis of delay requires some development of the relevant factual context when a plaintiff alleges, as Loudermill has, that the administrative process has taken longer than some minimal amount of time. Indeed, all of our precedents that have considered administrative delays under the Due Process Clause, either explicitly or *sub silentio*, have been decided only after more complete proceedings in the District Courts. See, *e. g.*, *$8,850*, *supra;* *Barry* v. *Barchi*, 443 U. S. 55 (1979); *Arnett* v. *Kennedy*, 416 U. S. 134 (1974); *Mathews* v. *Eldridge*, *supra.*[4] Yet in Part V, the Court summarily holds Loudermill's allegations insufficient, without adverting to any considered balancing of interests. Disposal of Loudermill's complaint without examining the competing interests involved marks an unexplained departure from the careful multifaceted analysis of the facts we consistently have employed in the past.

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[4] After giving careful consideration to well-developed factual contexts, the Court has reached results that might be viewed as inconsistent in the abstract. Compare *Barchi*, 443 U. S., at 66 (disapproving statute requiring decision within 30 days of hearing), with *Arnett*, 416 U. S., at 194 (WHITE, J., concurring in part and dissenting in part) (approving statutory scheme under which over 50 percent of discharge appeals "take more than three months"). Rather than inconsistency, however, these differing results demonstrate the impossibility of drawing firm lines and the importance of factual development in such cases.

I previously have stated my view that

> "[t]o be meaningful, an opportunity for a full hearing and determination must be afforded at least at a time when the potentially irreparable and substantial harm caused by a suspension can still be avoided—*i. e.*, either before or immediately after suspension." *Barry* v. *Barchi*, *supra*, at 74 (BRENNAN, J., concurring in part).

Loudermill's allegations of months-long administrative delay, taken together with the facially divergent results regarding length of administrative delay found in *Barchi* as compared to *Arnett*, see n. 4, *supra*, are sufficient in my mind to require further factual development. In no other way can the third *Mathews* factor—"the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement [in this case, a speedier hearing and decision] would entail," 424 U. S., at 335—sensibly be evaluated in this case.[5] I therefore would remand the delay issue to the District Court for further evidentiary proceedings consistent with the *Mathews* approach. I respectfully dissent from the Court's contrary decision in Part V.

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[5] In light of the complete absence of record evidence, it is perhaps unsurprising that the Court of Appeals below was forced to speculate that "[t]he delays in the instant cases in all likelihood were inadvertent." 721 F. 2d, at 564, n. 19. Similarly, the Cleveland Board of Education and Civil Service Commission assert only that "[n]o authority is necessary to support the proposition" that administrative resolution of a case like Loudermill's in less than nine months is "almost impossible." Brief for Respondents in No. 83–6392, p. 8, n. 4. To the contrary, however, I believe our precedents clearly require demonstration of some "authority" in these circumstances.

JUSTICE REHNQUIST, dissenting.

In *Arnett* v. *Kennedy*, 416 U. S. 134 (1974), six Members of this Court agreed that a public employee could be dismissed for misconduct without a full hearing prior to termination. A plurality of Justices agreed that the employee was entitled to exactly what Congress gave him, and no more. THE CHIEF JUSTICE, Justice Stewart, and I said:

> "Here appellee did have a statutory expectancy that he not be removed other than for 'such cause as will promote the efficiency of [the] service.' But the very section of the statute which granted him that right, a right which had previously existed only by virtue of administrative regulation, expressly provided also for the procedure by which 'cause' was to be determined, and expressly omitted the procedural guarantees which appellee insists are mandated by the Constitution. Only by bifurcating the very sentence of the Act of Congress which conferred upon appellee the right not to be removed save for cause could it be said that he had an expectancy of that substantive right without the procedural limitations which Congress attached to it. In the area of federal regulation of government employees, where in the absence of statutory limitation the governmental employer has had virtually uncontrolled latitude in decisions as to hiring and firing, *Cafeteria Workers* v. *McElroy*, 367 U. S. 886, 896–897 (1961), we do not believe that a statutory enactment such as the Lloyd-La Follette Act may be parsed as discretely as appellee urges. Congress was obviously intent on according a measure of statutory job security to governmental employees which they had not previously enjoyed, but was likewise intent on excluding more elaborate procedural requirements which it felt would make the operation of the new scheme unnecessarily burdensome in practice. Where the focus of legislation was thus strongly on the procedural mechanism for enforcing the substantive

> right which was simultaneously conferred, we decline to conclude that the substantive right may be viewed wholly apart from the procedure provided for its enforcement. The employee's statutorily defined right is not a guarantee against removal without cause in the abstract, but such a guarantee as enforced by the procedures which Congress has designated for the determination of cause." *Id.*, at 151–152.

In these cases, the relevant Ohio statute provides in its first paragraph that

> "[t]he tenure of every officer or employee in the classified service of the state and the counties, civil service townships, cities, city health districts, general health districts, and city school districts thereof, holding a position under this chapter of the Revised Code, shall be during good behavior and efficient service and no such officer or employee shall be reduced in pay or position, suspended, or removed, except . . . for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of such sections or the rules of the director of administrative services or the commission, or any other failure of good behavior, or any other acts of misfeasance, malfeasance, or nonfeasance in office." Ohio Rev. Code Ann. § 124.34 (1984).

The very next paragraph of this section of the Ohio Revised Code provides that in the event of suspension of more than three days or removal the appointing authority shall furnish the employee with the stated reasons for his removal. The next paragraph provides that within 10 days following the receipt of such a statement, the employee may appeal in writing to the State Personnel Board of Review or the Commission, such appeal shall be heard within 30 days from the time of its filing, and the Board may affirm, disaffirm, or modify the judgment of the appointing authority.

Thus in one legislative breath Ohio has conferred upon civil service employees such as respondents in these cases a limited form of tenure during good behavior, and prescribed the procedures by which that tenure may be terminated. Here, as in *Arnett*, "[t]he employee's statutorily defined right is not a guarantee against removal without cause in the abstract, but such a guarantee as enforced by the procedures which [the Ohio Legislature] has designated for the determination of cause." 416 U. S., at 152 (opinion of REHNQUIST, J.). We stated in *Board of Regents* v. *Roth*, 408 U. S. 564, 577 (1972):

> "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."

We ought to recognize the totality of the State's definition of the property right in question, and not merely seize upon one of several paragraphs in a unitary statute to proclaim that in that paragraph the State has inexorably conferred upon a civil service employee something which it is powerless under the United States Constitution to qualify in the next paragraph of the statute. This practice ignores our duty under *Roth* to rely on state law as the source of property interests for purposes of applying the Due Process Clause of the Fourteenth Amendment. While it does not impose a federal definition of property, the Court departs from the full breadth of the holding in *Roth* by its selective choice from among the sentences the Ohio Legislature chooses to use in establishing and qualifying a right.

Having concluded by this somewhat tortured reasoning that Ohio has created a property right in the respondents in these cases, the Court naturally proceeds to inquire what process is "due" before the respondents may be divested of that right. This customary "balancing" inquiry conducted by the Court in these cases reaches a result that is quite unobjectionable, but it seems to me that it is devoid of any principles which will either instruct or endure. The balance is simply an ad hoc weighing which depends to a great extent upon how the Court subjectively views the underlying interests at stake. The results in previous cases and in these cases have been quite unpredictable. To paraphrase Justice Black, today's balancing act requires a "pretermination opportunity to respond" but there is nothing that indicates what tomorrow's will be. *Goldberg* v. *Kelly*, 397 U. S. 254, 276 (1970) (Black, J., dissenting). The results from today's balance certainly do not jibe with the result in *Goldberg* or *Mathews* v. *Eldridge*, 424 U. S. 319 (1976).* The lack of

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*Today the balancing test requires a pretermination opportunity to respond. In *Goldberg* we required a full-fledged trial-type hearing, and in *Mathews* we declined to require any pretermination process other than those required by the statute. At times this balancing process may look as if it were undertaken with a thumb on the scale, depending upon the result the Court desired. For example, in *Mathews* we minimized the importance of the benefit to the recipient, stating that after termination he could always go on welfare to survive. 424 U. S., at 340–343; see also *id.*, at 350 (BRENNAN, J., dissenting). Today, however, the Court exalts the recipient's interest in retaining employment; not a word is said about going on welfare. Conversely, in *Mathews* we stressed the interests of the State, while today, in a footnote, the Court goes so far as to denigrate the State's interest in firing a school security guard who had lied about a prior felony conviction. *Ante*, at 545, n. 10.

Today the Court purports to describe the State's interest, *ante*, at 544–545, but does so in a way that is contrary to what petitioner Boards of Education have asserted in their briefs. The description of the State's interests looks more like a makeweight to support the Court's result. The decision whom to train and employ is strictly a decision for the State. The Court attempts to ameliorate its ruling by stating that a State may always suspend an employee with pay, in lieu of a predischarge hearing, if it determines that he poses a threat. *Ibid.* This does less than justice to the State's interest in its financial integrity and its interest in promptly terminating an employee who has violated the conditions of his tenure, and ignores Ohio's current practice of paying back wages to wrongfully discharged employees.

any principled standards in this area means that these procedural due process cases will recur time and again. Every different set of facts will present a new issue on what process was due and when. One way to avoid this subjective and varying interpretation of the Due Process Clause in cases such as these is to hold that one who avails himself of government entitlements accepts the grant of tenure along with its inherent limitations.

Because I believe that the Fourteenth Amendment of the United States Constitution does not support the conclusion that Ohio's effort to confer a limited form of tenure upon respondents resulted in the creation of a "property right" in their employment, I dissent.

ANDERSON *v.* CITY OF BESSEMER CITY, NORTH CAROLINA

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 83-1623. Argued December 3, 1984—Decided March 19, 1985

In 1975, respondent city set about to hire a new Recreation Director to manage the city's recreational facilities and to develop recreational programs. A committee, consisting of four men and one woman, was responsible for choosing the Director. Eight persons applied for the position, including petitioner, the only woman applicant. At the time, petitioner was a 39-year-old schoolteacher with college degrees in social studies and education. The committee offered the position to a 24-year-old male applicant, who had recently graduated from college with a degree in physical education. The four men on the committee voted to offer the job to him, and only the woman voted for petitioner. Petitioner then filed discrimination charges with the Equal Employment Opportunity Commission (EEOC), which, upon finding that there was reasonable cause to believe that petitioner's charges were true, invited the parties to engage in conciliation proceedings. When these efforts proved unsuccessful, the EEOC issued petitioner a right-to-sue letter, and she filed an action in Federal District Court under Title VII of the Civil Rights Act of 1964. After a trial in which testimony from petitioner, the applicant who was hired, and members of the selection committee was heard, the court issued a memorandum announcing its finding that petitioner was entitled to judgment because she had been denied the position on account of her sex. The memorandum requested petitioner to submit proposed findings of fact and conclusions of law expanding upon those set forth in the memorandum. When petitioner complied with this request, the court requested and received a response setting forth respondent's objections to the proposed findings. The court then issued its own findings of fact and conclusions of law. The court's finding that petitioner had been denied employment because of her sex was based on findings of fact that she was the most qualified candidate, that she had been asked questions during her interview regarding her spouse's feelings about her application for the position that other applicants were not asked, and that the male committee members were biased against hiring a woman. The Court of Appeals reversed, holding that the District Court's findings were clearly erroneous and that the court had therefore erred in finding that petitioner had been discriminated against on account of sex.

Held: The Court of Appeals misapprehended and misapplied the clearly-erroneous standard and accordingly erred in denying petitioner relief under Title VII. Pp. 571–581.

(a) Where the District Court did not simply adopt petitioner's proposed findings but provided respondent with an opportunity to respond to those findings and the findings ultimately issued varied considerably from those proposed by petitioner, there is no reason to doubt that the ultimate findings represented the court's own considered conclusions or to subject those findings to a more stringent appellate review than is called for by the applicable rules. Pp. 571–573.

(b) Under Federal Rule of Civil Procedure 52(a)—which provides that "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witness"—"[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed." *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 394–395. If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. This is so even when the district court's findings do not rest on credibility determinations, but are based on physical or documentary evidence or inferences from other facts. When findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's finding. Pp. 573–576.

(c) Application of the above principles to the facts of this case discloses that the Court of Appeals erred in its employment of the clearly-erroneous standard. The District Court's finding that petitioner was better qualified was entitled to deference notwithstanding it was not based on credibility determinations, and the record contains nothing that mandates a holding that the finding was clearly erroneous. As to the District Court's finding that petitioner was the only applicant asked questions regarding her spouse's feelings about her application for the position, the Court of Appeals erred in failing to give due regard to the District Court's ability to interpret and discern the credibility of oral testimony, especially that of the woman member of the selection committee, whose testimony the District Court felt supported the finding. Given that that finding was not clearly erroneous, the District Court's finding of bias cannot be termed erroneous. It is supported not only by the treatment of petitioner in her interview but also by the testimony of one committee member that he believed it would have been difficult for a woman to perform the job and by evidence that another member solicited applications only from men. Because the findings on which the

District Court based its finding of sex discrimination were not clearly erroneous, its finding of discrimination was also not clearly erroneous. Pp. 576–581.

717 F. 2d 149, reversed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, MARSHALL, POWELL, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. POWELL, J., filed a concurring opinion, *post*, p. 581. BLACKMUN, J., filed an opinion concurring in the judgment, *post*, p. 581.

Jonathan Wallas argued the cause for petitioner. With him on the briefs were *John T. Nockelby*, *J. LeVonne Chambers*, *O. Peter Sherwood*, and *Eric Schnapper*.

Carolyn S. Corwin argued the cause for the United States et al. as *amici curiae* urging reversal. With her on the brief were *Solicitor General Lee*, *Deputy Solicitor General Wallace*, *Johnny J. Butler*, and *Philip B. Sklover*.

Philip M. Van Hoy argued the cause for respondent. With him on the brief were *Eugene Gressman* and *Arthur C. Blue III*.*

JUSTICE WHITE delivered the opinion of the Court.

In *Pullman-Standard* v. *Swint*, 456 U. S. 273 (1982), we held that a District Court's finding of discriminatory intent in an action brought under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.*, is a factual finding that may be overturned on appeal only if it is clearly erroneous. In this case, the Court of Appeals for the Fourth Circuit concluded that there was clear error in a District Court's finding of discrimination and reversed. Because our reading of the record convinces us that the Court of Appeals misapprehended and misapplied the clearly-erroneous standard, we reverse.

**Joan E. Bertin*, *E. Richard Larson*, *Burt Neuborne*, and *Isabelle Katz Pinzler* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging reversal.

I

Early in 1975, officials of respondent Bessemer City, North Carolina, set about to hire a new Recreation Director for the city. Although the duties that went with the position were not precisely delineated, the new Recreation Director was to be responsible for managing all of the city's recreational facilities and for developing recreational programs—athletic and otherwise—to serve the needs of the city's residents. A five-member committee selected by the Mayor was responsible for choosing the Recreation Director. Of the five members, four were men; the one woman on the committee, Mrs. Auddie Boone, served as the chairperson.

Eight persons applied for the position of Recreation Director. Petitioner, at the time a 39-year-old schoolteacher with college degrees in social studies and education, was the only woman among the eight. The selection committee reviewed the resumés submitted by the applicants and briefly interviewed each of the jobseekers. Following the interviews, the committee offered the position to Mr. Donald Kincaid, a 24-year-old who had recently graduated from college with a degree in physical education. All four men on the committee voted to offer the job to Mr. Kincaid; Mrs. Boone voted for petitioner.

Believing that the committee had passed over her in favor of a less qualified candidate solely because she was a woman, petitioner filed discrimination charges with the Charlotte District Office of the Equal Employment Opportunity Commission. In July 1980 (five years after petitioner filed the charges), the EEOC's District Director found that there was reasonable cause to believe that petitioner's charges were true and invited the parties to attempt a resolution of petitioner's grievance through conciliation proceedings. The EEOC's efforts proved unsuccessful, and in due course, petitioner received a right-to-sue letter.

Petitioner then filed this Title VII action in the United States District Court for the Western District of North

Carolina. After a 2-day trial during which the court heard testimony from petitioner, Mr. Kincaid, and the five members of the selection committee, the court issued a brief memorandum of decision setting forth its finding that petitioner was entitled to judgment because she had been denied the position of Recreation Director on account of her sex. In addition to laying out the rationale for this finding, the memorandum requested that petitioner's counsel submit proposed findings of fact and conclusions of law expanding upon those set forth in the memorandum. Petitioner's counsel complied with this request by submitting a lengthy set of proposed findings (App. 11a–34a); the court then requested and received a response setting forth in detail respondent's objections to the proposed findings (*id.*, at 36a–47a)—objections that were, in turn, answered by petitioner's counsel in a somewhat less lengthy reply (*id.*, at 48a–54a). After receiving these submissions, the court issued its own findings of fact and conclusions of law. 557 F. Supp. 412, 413–419 (1983).

As set forth in the formal findings of fact and conclusions of law, the court's finding that petitioner had been denied employment by respondent because of her sex rested on a number of subsidiary findings. First, the court found that at the time the selection committee made its choice, petitioner had been better qualified than Mr. Kincaid to perform the range of duties demanded by the position. The court based this finding on petitioner's experience as a classroom teacher responsible for supervising schoolchildren in recreational and athletic activities, her employment as a hospital recreation director in the late 1950's, her extensive involvement in a variety of civic organizations, her knowledge of sports acquired both as a high school athlete and as a mother of children involved in organized athletics, her skills as a public speaker, her experience in handling money (gained in the course of her community activities and in her work as a bookkeeper for a group of physicians), and her knowledge of music, dance, and crafts. The court found that Mr. Kincaid's principal qualifications were his experience as a student teacher and as a coach in a local youth basketball league, his extensive knowledge of team and individual sports, acquired as a result of his lifelong involvement in athletics, and his formal training as a physical education major in college. Noting that the position of Recreation Director involved more than the management of athletic programs, the court concluded that petitioner's greater breadth of experience made her better qualified for the position.

Second, the court found that the male committee members had in fact been biased against petitioner because she was a woman. The court based this finding in part on the testimony of one of the committee members that he believed it would have been "real hard" for a woman to handle the job and that he would not want his wife to have to perform the duties of the Recreation Director. The finding of bias found additional support in evidence that another male committee member had told Mr. Kincaid, the successful applicant, of the vacancy and had also solicited applications from three other men, but had not attempted to recruit any women for the job.

Also critical to the court's inference of bias was its finding that petitioner, alone among the applicants for the job, had been asked whether she realized the job would involve night work and travel and whether her husband approved of her applying for the job. The court's finding that the committee had pursued this line of inquiry only with petitioner was based on the testimony of petitioner that these questions had been asked of her and the testimony of Mrs. Boone that similar questions had not been asked of the other applicants. Although Mrs. Boone also testified that during Mr. Kincaid's interview, she had made a "comment" to him regarding the reaction of his new bride to his taking the position of Recreation Director, the court concluded that this comment was not a serious inquiry, but merely a "facetious" remark prompted by Mrs. Boone's annoyance that only petitioner had been questioned about her spouse's reaction. The court also declined to credit the testimony of one of the male committee members that Mr. Kincaid had been asked about his wife's feelings "in a way" and the testimony of another committeeman that all applicants had been questioned regarding their willingness to work at night and their families' reaction to night work. The court concluded that the finding that only petitioner had been seriously questioned about her family's reaction suggested that the male committee members believed women had special family responsibilities that made certain forms of employment inappropriate.

Finally, the court found that the reasons offered by the male committee members for their choice of Mr. Kincaid were pretextual. The court rejected the proposition that Mr. Kincaid's degree in physical education justified his choice, as the evidence suggested that where male candidates were concerned, the committee valued experience more highly than formal training in physical education.[1] The court also rejected the claim of one of the committeemen that Mr. Kincaid had been hired because of the superiority of the recreational programs he planned to implement if selected for the job. The court credited the testimony of one of the other committeemen who had voted for Mr. Kincaid that the programs outlined by petitioner and Mr. Kincaid were substantially identical.

On the basis of its findings that petitioner was the most qualified candidate, that the committee had been biased against hiring a woman, and that the committee's explanations for its choice of Mr. Kincaid were pretextual, the court concluded that petitioner had met her burden of establishing that she had been denied the position of Recreation Director because of her sex. Petitioner having conceded that ordering the city to hire her would be an inappropriate remedy under the circumstances, the court awarded petitioner backpay in the amount of $30,397 and attorney's fees of $16,971.59.

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[1] The evidence established that the committee members had initially favored a third candidate, Bert Broadway, and had decided not to hire him only because he stated that he was unwilling to move to Bessemer City. Mr. Broadway had two years of experience as a community recreation director; but like petitioner, he lacked a college degree in physical education.

The Fourth Circuit reversed the District Court's finding of discrimination. 717 F. 2d 149 (1983). In the view of the Court of Appeals, three of the District Court's crucial findings were clearly erroneous: the finding that petitioner was the most qualified candidate, the finding that petitioner had been asked questions that other applicants were spared, and the finding that the male committee members were biased against hiring a woman. Having rejected these findings, the Court of Appeals concluded that the District Court had erred in finding that petitioner had been discriminated against on account of her sex.

II

We must deal at the outset with the Fourth Circuit's suggestion that "close scrutiny of the record in this case [was] justified by the manner in which the opinion was prepared," *id.*, at 156—that is, by the District Court's adoption of petitioner's proposed findings of fact and conclusions of law. The court recalled that the Fourth Circuit had on many occasions condemned the practice of announcing a decision and leaving it to the prevailing party to write the findings of fact and conclusions of law. See, *e. g., Cuthbertson* v. *Biggers Bros., Inc.*, 702 F. 2d 454 (1983); *EEOC* v. *Federal Reserve Bank of Richmond*, 698 F. 2d 633 (1983); *Chicopee Mfg. Corp.* v. *Kendall Co.*, 288 F. 2d 719 (1961). The court rejected petitioner's contention that the procedure followed by the trial judge in this case was proper because the judge had given respondent an opportunity to object to the proposed findings and had not adopted petitioner's findings verbatim. According to the court, the vice of the procedure lay in the trial court's solicitation of findings after it had already announced its decision and in the court's adoption of the "substance" of petitioner's proposed findings.

We, too, have criticized courts for their verbatim adoption of findings of fact prepared by prevailing parties, particularly when those findings have taken the form of conclusory statements unsupported by citation to the record. See, *e. g.*, *United States* v. *El Paso Natural Gas Co.*, 376 U. S. 651, 656–657 (1964); *United States* v. *Marine Bancorporation*, 418 U. S. 602, 615, n. 13 (1974). We are also aware of the potential for overreaching and exaggeration on the part of attorneys preparing findings of fact when they have already been informed that the judge has decided in their favor. See J. Wright, The Nonjury Trial—Preparing Findings of Fact, Conclusions of Law, and Opinions, Seminars for Newly Appointed United States District Judges 159, 166 (1962). Nonetheless, our previous discussions of the subject suggest that even when the trial judge adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous. *United States* v. *Marine Bancorporation*, *supra*, at 615, n. 13; *United States* v. *El Paso Natural Gas Co.*, *supra*, at 656–657.

In any event, the District Court in this case does not appear to have uncritically accepted findings prepared without judicial guidance by the prevailing party. The court itself provided the framework for the proposed findings when it issued its preliminary memorandum, which set forth its essential findings and directed petitioner's counsel to submit a more detailed set of findings consistent with them. Further, respondent was provided and availed itself of the opportunity to respond at length to the proposed findings. Nor did the District Court simply adopt petitioner's proposed findings: the findings it ultimately issued—and particularly the crucial findings regarding petitioner's qualifications, the questioning to which petitioner was subjected, and bias on the part of the committeemen—vary considerably in organization and content from those submitted by petitioner's counsel. Under these circumstances, we see no reason to doubt that the findings issued by the District Court represent the judge's own considered conclusions. There is no reason to subject those findings to a more stringent appellate review than is called for by the applicable rules.

III

Because a finding of intentional discrimination is a finding of fact, the standard governing appellate review of a district court's finding of discrimination is that set forth in Federal Rule of Civil Procedure 52(a): "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." The question before us, then, is whether the Court of Appeals erred in holding the District Court's finding of discrimination to be clearly erroneous.

Although the meaning of the phrase "clearly erroneous" is not immediately apparent, certain general principles governing the exercise of the appellate court's power to overturn findings of a district court may be derived from our cases. The foremost of these principles, as the Fourth Circuit itself recognized, is that "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 395 (1948). This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court. "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*." *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U. S. 100, 123 (1969). If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. *United States* v. *Yellow Cab Co.*, 338 U. S. 338, 342 (1949); see also *Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.*, 456 U. S. 844 (1982).

This is so even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts. To be sure, various Courts of Appeals have on occasion asserted the theory that an appellate court may exercise *de novo* review over findings not based on credibility determinations. See, *e. g.*, *Orvis* v. *Higgins*, 180 F. 2d 537 (CA2 1950); *Lydle* v. *United States*, 635 F. 2d 763, 765, n. 1 (CA6 1981); *Swanson* v. *Baker Industries, Inc.*, 615 F. 2d 479, 483 (CA8 1980). This theory has an impressive genealogy, having first been articulated in an opinion written by Judge Frank and subscribed to by Judge Augustus Hand, see *Orvis* v. *Higgins*, *supra*, but it is impossible to trace the theory's lineage back to the text of Rule 52(a), which states straightforwardly that "findings of fact shall not be set aside unless clearly erroneous." That the Rule goes on to emphasize the special deference to be paid credibility determinations does not alter its clear command: Rule 52(a) "does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous." *Pullman-Standard* v. *Swint*, 456 U. S., at 287.

The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. As the Court has stated in a different context, the trial on the merits should be "the 'main event' . . . rather than a 'tryout on the road.'" *Wainwright* v. *Sykes*, 433 U. S. 72, 90 (1977). For these reasons, review of factual findings under the clearly-erroneous standard—with its deference to the trier of fact—is the rule, not the exception.

When findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said. See *Wainwright* v. *Witt*, 469 U. S. 412 (1985). This is not to suggest that the trial judge may insulate his findings from review by denominating them credibility determinations, for factors other than demeanor and inflection go into the decision whether or not to believe a witness. Documents or objective evidence may contradict the witness' story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable factfinder would not credit it. Where such factors are present, the court of appeals may well find clear error even in a finding purportedly based on a credibility determination. See, *e. g.*, *United States* v. *United States Gypsum Co.*, *supra*, at 396. But when a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error.

Cf. *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 433 (CA2 1945); *Orvis* v. *Higgins*, *supra*, at 539–540.

IV

Application of the foregoing principles to the facts of the case lays bare the errors committed by the Fourth Circuit in its employment of the clearly-erroneous standard. In detecting clear error in the District Court's finding that petitioner was better qualified than Mr. Kincaid, the Fourth Circuit improperly conducted what amounted to a *de novo* weighing of the evidence in the record. The District Court's finding was based on essentially undisputed evidence regarding the respective backgrounds of petitioner and Mr. Kincaid and the duties that went with the position of Recreation Director. The District Court, after considering the evidence, concluded that the position of Recreation Director in Bessemer City carried with it broad responsibilities for creating and managing a recreation program involving not only athletics, but also other activities for citizens of all ages and interests. The court determined that petitioner's more varied educational and employment background and her extensive involvement in a variety of civic activities left her better qualified to implement such a rounded program than Mr. Kincaid, whose background was more narrowly focused on athletics.

The Fourth Circuit, reading the same record, concluded that the basic duty of the Recreation Director was to implement an athletic program, and that the essential qualification for a successful applicant would be either education or experience specifically related to athletics.[2] Accordingly, it seemed evident to the Court of Appeals that Mr. Kincaid was in fact better qualified than petitioner.

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[2] The Fourth Circuit thus saw no inconsistency between the statement of the male committee members that they preferred Bert Broadway because of his experience and their claim that they had selected Mr. Kincaid over petitioner because of his formal training. See n. 1, *supra*. In the view of the Court of Appeals, this demonstrated only that Mr. Broadway had relevant experience and Mr. Kincaid had relevant education, while petitioner had neither.

Based on our own reading of the record, we cannot say that either interpretation of the facts is illogical or implausible. Each has support in inferences that may be drawn from the facts in the record; and if either interpretation had been drawn by a district court on the record before us, we would not be inclined to find it clearly erroneous. The question we must answer, however, is not whether the Fourth Circuit's interpretation of the facts was clearly erroneous, but whether the District Court's finding was clearly erroneous. See *McAllister* v. *United States*, 348 U. S. 19, 20–21 (1954). The District Court determined that petitioner was better qualified, and, as we have stated above, such a finding is entitled to deference notwithstanding that it is not based on credibility determinations. When the record is examined in light of the appropriately deferential standard, it is apparent that it contains nothing that mandates a finding that the District Court's conclusion was clearly erroneous.

Somewhat different concerns are raised by the Fourth Circuit's treatment of the District Court's finding that petitioner, alone among the applicants for the position of Recreation Director, was asked questions regarding her spouse's feelings about her application for the position. Here the error of the Court of Appeals was its failure to give due regard to the ability of the District Court to interpret and discern the credibility of oral testimony. The Court of Appeals rested its rejection of the District Court's finding of differential treatment on its own interpretation of testimony by Mrs. Boone—the very witness whose testimony, in the view of the District Court, supported the finding. In the eyes of the Fourth Circuit, Mrs. Boone's testimony that she had made a "comment" to Mr. Kincaid about the feelings of his wife (a comment judged "facetious" by the District Court) conclusively established that Mr. Kincaid, and perhaps other male applicants as well, had been questioned about the feelings of his spouse.

Mrs. Boone's testimony on this point, which is set forth in the margin,[3] is certainly not free from ambiguity. But Mrs. Boone several times stated that other candidates had not been questioned about the reaction of their wives—at least, "not in the same context" as had petitioner. And even after recalling and calling to the attention of the court that she had made a comment on the subject to Mr. Kincaid, Mrs. Boone denied that she had "asked" Mr. Kincaid about his wife's reaction. Mrs. Boone's testimony on these matters is not inconsistent with the theory that her remark was not a serious inquiry into whether Mr. Kincaid's wife approved of his applying for the position. Whether the judge's interpretation is actually correct is impossible to tell from the paper record, but it is easy to imagine that the tone of voice in which the witness related her comment, coupled with her immediate denial that she had questioned Mr. Kincaid on the subject, might have conclusively established that the remark was a facetious one. We therefore cannot agree that the judge's conclusion that the remark was facetious was clearly erroneous.

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[3] "Q: Did the committee members ask that same kind of question of the other applicants?

"A: Not that I recall.

. . . . .

"Q: Do you deny that the other applicants, aside from the plaintiff, were asked about the prospect of working at night in that position?

"A: Not to my knowledge.

"Q: Are you saying they were not asked that?

"A: They were not asked, not in the context that they were asked of Phyllis. I don't know whether they were worried because Jim wasn't going to get his supper or what. You know, that goes both ways.

"Q: Did you tell Phyllis Anderson that Donnie Kincaid was not asked about night work?

"A: He wasn't asked about night work.

"Q: That answers one question. Now, let's answer the other one. Did you tell Phyllis Anderson that, that Donnie Kincaid was not asked about night work?

"A: Yes, after the interviews—I think the next day or sometime, and I know—may I answer something?

"Q: If it's a question that has been asked; otherwise, no. It's up to the Judge to say.

"A: You asked if there was any question asked about—I think Donnie was just married, and I think I made the comment to him personally—and your new bride won't mind.

"Q: So, you asked him yourself about his own wife's reaction?

"A: No, no.

"Q: That is what you just said.

"Mr. Gibson: Objection, Your Honor.

"[The] Court: Sustained. You don't have to rephrase the answer."

App. 108a, 120a-121a.

Once the trial court's characterization of Mrs. Boone's remark is accepted, it is apparent that the finding that the male candidates were not seriously questioned about the feelings of their wives cannot be deemed clearly erroneous. The trial judge was faced with the testimony of three witnesses, one of whom (Mrs. Boone) stated that none of the other candidates had been so questioned, one of whom (a male committee member) testified that Mr. Kincaid had been asked such a question "in a way," and one of whom (another committeeman) testified that all the candidates had been subjected to similar questioning. None of these accounts is implausible on its face, and none is contradicted by any reliable extrinsic evidence. Under these circumstances, the trial court's decision to credit Mrs. Boone was not clearly erroneous.

The Fourth Circuit's refusal to accept the District Court's finding that the committee members were biased against hiring a woman was based to a large extent on its rejection of the finding that petitioner had been subjected to questioning that the other applicants were spared. Given that that finding was not clearly erroneous, the finding of bias cannot be termed erroneous: it finds support not only in the treatment of petitioner in her interview, but also in the testimony of one committee member that he believed it would have been difficult for a woman to perform the job and in the evidence that another member solicited applications for the position only from men.[4]

Our determination that the findings of the District Court regarding petitioner's qualifications, the conduct of her interview, and the bias of the male committee members were not clearly erroneous leads us to conclude that the court's finding that petitioner was discriminated against on account of her sex was also not clearly erroneous. The District Court's findings regarding petitioner's superior qualifications and the bias of the selection committee are sufficient to support the inference that petitioner was denied the position of Recreation Director on account of her sex. Accordingly, we hold that the Fourth Circuit erred in denying petitioner relief under Title VII.

In so holding, we do not assert that our knowledge of what happened 10 years ago in Bessemer City is superior to that of the Court of Appeals; nor do we claim to have greater insight than the Court of Appeals into the state of mind of the men on the selection committee who rejected petitioner for the position of Recreation Director. Even the trial judge, who has heard the witnesses directly and who is more closely in touch than the appeals court with the milieu out of which the controversy before him arises, cannot always be confident that he "knows" what happened. Often, he can only determine whether the plaintiff has succeeded in presenting an account of the facts that is more likely to be true than not. Our task—and the task of appellate tribunals generally—is more limited still: we must determine whether the trial judge's conclusions are clearly erroneous. On the record before us, we cannot say that they are. Accordingly, the judgment of the Court of Appeals is

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[4] The Fourth Circuit's suggestion that any inference of bias was dispelled by the fact that each of the male committee members was married to a woman who had worked at some point in the marriage is insufficient to establish that the finding of bias was clearly erroneous. Although we decline to hold that a man's attitude toward his wife's employment is irrelevant to the question whether he may be found to have a bias against working women, any relevance the factor may have in a particular case is a matter for the district court to weigh in its consideration of bias, not the court of appeals.

Reversed.

JUSTICE POWELL, concurring.

I do not dissent from the judgment that the Court of Appeals misapplied Rule 52(a) in this case. I write separately, however, because I am concerned that one may read the Court's opinion as implying criticism of the Court of Appeals for the very fact that it engaged in a comprehensive review of the entire record of this case. Such a reading may encourage overburdened Courts of Appeals simply to apply Rule 52(a) in a conclusory fashion, rather than to undertake the type of burdensome review that may be appropriate in some cases.

In this case, the Court of Appeals made no arbitrary judgment that the action of the District Court was clearly erroneous. On the contrary, the court meticulously reviewed the entire record and reached the conclusion that the District Court was in error. One easily could agree with the Court of Appeals that the District Court committed a mistake in its finding of sex discrimination, based, as it was, on fragmentary statements made years before* in informal exchanges between members of the selection committee and the applicants for the position to be filled. On the record before us, however, the factual issue fairly could be decided for either party. Therefore, as the Court holds, the District Court's decision was not clearly erroneous within the meaning of Rule 52(a).

JUSTICE BLACKMUN, concurring in the judgment.

I would like to join the Court's opinion, for I think its judgment is correct, and I agree with most of what the Court says. I, however, do not join the broad dictum, *ante*, at 573–574, to the effect that the same result is to be reached when the district court's findings are based wholly on documentary evidence and do not rest at all on credibility determinations. In the past, I have joined at least one opinion that, generally, is to the opposite effect. See *United States* v. *Mississippi Valley Barge Line Co.*, 285 F. 2d 381, 388 (CA8 1960). See also *Ralston Purina Co.* v. *General Foods Corp.*, 442 F. 2d 389, 391 (CA8 1971); *Frito-Lay, Inc.* v. *So Good Potato Chip Co.*, 540 F. 2d 927, 930 (CA8 1976); *Swanson* v. *Baker Industries, Inc.*, 615 F. 2d 479, 483 (CA8 1980).

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*The Charlotte branch of the EEOC, with whom petitioner filed a complaint, took no action for five years. The testimony at trial, therefore, was based on stale recollections.

While the Court may be correct in its dictum today, certainly this case does not require us to decide the question. The record contains far more than documentary evidence, as the Court's opinion so adequately discloses. In a case that requires resolution of the question, I might eventually be persuaded that the Court's approach is wise. I prefer, however, to wait for a case where the issue must be resolved and where it has been briefed and argued by the parties, rather than to address the issue by edict without these customary safeguards.

I therefore join the Court only in its judgment and not in its opinion.

FIRST NATIONAL BANK OF ATLANTA, AS SUCCESSOR IN INTEREST TO FIRST NATIONAL BANK OF CARTERSVILLE, GEORGIA *v.* BARTOW COUNTY BOARD OF TAX ASSESSORS ET AL.

APPEAL FROM THE SUPREME COURT OF GEORGIA

No. 83-1620. Argued October 30, 1984—Decided March 19, 1985

Prior to 1982, Rev. Stat. § 3701 provided that "[a]ll stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority," and, as amended in 1959, further provided that such "exemption extends to every form of taxation that would require that either the obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax," except nondiscriminatory franchise or other nonproperty taxes or estate or inheritance taxes. Effective in 1980, a Georgia statute imposed a property tax on the fair market value of the shares of stockholders of banks. The fair market value of a bank's share was to be determined by dividing the bank's net worth by the number of outstanding shares. In calculating net worth, a bank was not allowed to deduct the value of United States obligations it held. Appellant bank's predecessor in interest, nevertheless, in its 1980 tax return deducted from its net worth the total value of the federal securities it held. Appellee Bartow County Board of Tax Assessors disallowed the deduction. The county Superior Court agreed. The Georgia Supreme Court construed the Georgia statute to allow a bank to deduct from its net worth not the full value of United States obligations it held but only the percentage of the federal obligations attributable to assets.

Held: Section 3701 is satisfied by the limited pro rata deduction for United States obligations approved by the Georgia Supreme Court. Pp. 588–597.

(a) *American Bank & Trust Co.* v. *Dallas County*, 463 U. S. 855, is not authority for allowing federal obligations to be excluded in full from a bank's total assets before net worth is determined. That case—which held that § 3701 prohibited a State from imposing on bank shares a property tax computed on the basis of the bank's net worth without any deduction for tax-exempt United States obligations held by the bank—addressed the forms of taxation that must allow an exemption for federal obligations, not the scope of the exemption that must be provided. Pp. 588–589.

(b) The tax exemption for Government obligations that is required by the Constitution is not a total exclusion, but, instead, may be limited by charging the obligations and their interest a fair share of related expenses or burdens. Pp. 589–593.

(c) Section 3701, as amended in 1959, provided an exemption no broader in scope than that which the Constitution requires. Pp. 593–596.

(d) The tax exemption required by the Constitution and § 3701 is not a tax shelter. Federal obligations may be acquired, in part, by liabilities, and, when they are, a pro rata method of allocating a fair share of the obligations to liabilities does not infringe upon the constitutional or statutory immunity the obligations enjoy. Pp. 596–597.

251 Ga. 831, 312 S. E. 2d 102, affirmed.

BLACKMUN, J., delivered the opinion for a unanimous Court.

Charles T. Zink argued the cause for appellant. With him on the briefs was *L. Trammell Newton, Jr.*

Alan I. Horowitz argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Lee, Assistant Attorney General Archer, Michael L. Paup,* and *Ernest J. Brown.*

Grace E. Evans, Assistant Attorney General of Georgia, argued the cause for appellees. With her on the brief were *Michael J. Bowers,* Attorney General, *James P. Googe, Jr.,* Executive Assistant Attorney General, *H. Perry Michael,* First Assistant Attorney General, *Verley J. Spivey,* Senior Assistant Attorney General, *James C. Pratt,* Assistant Attorney General, and *G. Carey Nelson.**

**Marvin S. Sloman, Brian M. Lidji, Peter S. Chantilis, Cecilia H. Morgan, Christopher G. Sharp,* and *Bruce W. Bowman, Jr.,* filed a brief for American Bank & Trust Co. et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the Commonwealth of Pennsylvania by *John P. Krill, Paul A. Adams,* and *George T. Bell;* for Citizens and Southern National Bank by *John L. Coalson, Jr.;* for the County of Dallas, Texas, et al. by *Earl Luna, Randel B. Gibbs,* and *Tim Kirk;* for the Pennsylvania Bankers Association by *John J. Brennan* and *P. J. DiQuinzio;* and for the Virginia Bankers Association by *John W. Edmonds III* and *Fred W. Palmore III.*

JUSTICE BLACKMUN delivered the opinion of the Court.

Two Terms ago, this Court, by a 6–2 vote, ruled that Rev. Stat. § 3701, as amended, 31 U. S. C. § 742 (1976 ed.), prohibited a State from imposing on bank shares a property tax computed on the basis of the bank's net worth without deduction for tax-exempt United States obligations held by the bank. *American Bank & Trust Co.* v. *Dallas County*, 463 U. S. 855 (1983). Section 3701 at that time provided:[1]

> "[A]ll stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority. This exemption extends to every form of taxation that would require that either the obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax, except nondiscriminatory franchise or other nonproperty taxes in lieu thereof imposed on corporations and except estate taxes or inheritance taxes."

In this case, we address a question left open in *American Bank*, see 463 U. S., at 865, n. 10: must a State, for property tax purposes, allow a bank to deduct from net worth the full value of tax-exempt United States obligations it holds, or is § 3701 satisfied by a limited deduction that excludes from net worth only that portion of the federal obligations properly attributable to assets rather than to liabilities?

I

Effective January 1, 1980, the State of Georgia imposed a property tax on the fair market value of the shares of the stockholders of banks and banking associations. 1978 Ga. Laws, No. 795, § 2, p. 523, codified as Ga. Code Ann. § 48–6–90(a)(1) (1982).[2] The fair market value of a bank's shares was to be determined "by adding together the amount of the capital stock, paid-in capital, appropriated retained earnings, and retained earnings . . . as shown on the unconsolidated statement of condition of the bank . . . and dividing the sum by the number of outstanding shares . . . ." This fair market value represented the bank's net worth. The State allowed banks, in the calculation of net worth, to deduct certain holdings, such as real estate taxed separately, § 48–6–90(a)(1), but did not authorize a deduction for the value of United States obligations held by the bank.

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[1] Title 31 of the United States Code was not enacted into positive law until 1982, when it was reformulated, it was said, "without substantive change." See Pub. L. 97–258, § 4(a), 96 Stat. 1067. Section 3701, as it had been amended by an addition in 1959, see Pub. L. 86–346, § 105(a), 73 Stat. 622, 31 U. S. C. § 742 (1976 ed.), was replaced in the 1982 reformulation by 31 U. S. C. § 3124(a). Because the tax at issue here was levied in 1980, the pre-1982 form of the statute technically controls this case.

When appellant's predecessor-in-interest bank filed its 1980 amended return, entitled "Determination of Taxable Value of Bank Shares," with appellee Bartow County Board of Tax Assessors, it deducted from its net worth the total value of the federal securities the bank held. App. A–4. The Board disallowed that deduction, and the Board of Tax Equalization affirmed the disallowance. Appellant then took its case to the Superior Court of Bartow County, which consolidated it with cases filed by two other banks: Citizens and Southern National Bank, whose deduction of United States securities the Board of Tax Equalization also had disallowed, and Bartow County Bank, whose deduction a different panel of the same Board had allowed. The Superior Court ruled in favor of disallowance, and the Supreme Court of Georgia affirmed. *Bartow County Bank* v. *Bartow County Bd. of Tax Assessors*, 248 Ga. 703, 285 S. E. 2d 920 (1982).

The banks appealed to this Court; we vacated the judgment and remanded the case for reconsideration in light of the then-recent decision in *American Bank, supra. Bartow County Bank* v. *Bartow County Bd. of Tax Assessors*, 463 U. S. 1221 (1983). On the remand to the Supreme Court of Georgia, the parties conceded that the Georgia bank-share tax statute, if construed to prohibit any deduction for the value of federal obligations a bank holds, would be invalid under the principles announced in *American Bank.* The court therefore sought to save the statute by construing it to allow a bank to deduct from its net worth "the percentage of assets attributable to federal obligations." *Bartow County Bank* v. *Bartow County Bd. of Tax Assessors*, 251 Ga. 831, 834, 312 S. E. 2d 102, 105 (1984). The court explained that if 9.75 percent of a bank's total assets consisted of federal obligations, the bank would be entitled to reduce its net worth by 9.75 percent. *Id.*, at 835–836, 312 S. E. 2d, at 106. According to the court, such a proportionate deduction recognizes that some of a bank's federal obligations are represented on the bank's balance sheet by liabilities, while some are represented by net worth.[3] Because the bank-share tax is assessed on net worth, not on total assets, the court reasoned, a proportionate deduction immunizes tax-exempt values, for it excludes federal obligations from the tax base—net worth—to the extent that they are represented there. *Id.*, at 833, 312 S. E. 2d, at 105. The court rejected the banks' argument that the total value of federal obligations had to be deducted from net worth in order for § 3701 to be satisfied; it indicated that such an absolute deduction would not only insulate the federal obligations from the share tax, as § 3701 requires, but would go beyond § 3701 and shelter the bank's taxable assets from the tax. *Id.*, at 834, 312 S. E. 2d, at 105.[4]

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[2] Effective January 1, 1984, the 1978 statute was repealed and replaced by another providing that "depository financial institutions shall be subject to all forms of state and local taxation in the same manner and to the same extent as other business corporations in Georgia." 1983 Ga. Laws, No. 524, § 5, p. 1355, codified as Ga. Code Ann. § 48–6–90 (Supp. 1984).

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[3] The court declined to decide whether Rev. Stat. § 3701 would entitle a bank to a full deduction if it could prove that its federal obligations were "actually purchased from capital stock or surplus." 251 Ga., at 834, n. 3, 312 S. E. 2d, at 105, n. 3.

[4] Some States have provided for a pro rata deduction similar to that formulated by the Georgia Supreme Court, either by statute or by adminis-

One of the three banks, appellant First National Bank of Atlanta, appealed.[5] We noted probable jurisdiction pursuant to 28 U. S. C. § 1257(2). 467 U. S. 1214 (1984).

II

Until 1959, Rev. Stat. § 3701 provided in pertinent part: "[A]ll stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority." In that year, however, Congress added a second sentence to § 3701: "This exemption extends to every form of taxation that would require that either the obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax," with certain exceptions not relevant here. Pub. L. 86–346, § 105(a), 73 Stat. 622, 31 U. S. C. § 742 (1976 ed.). In *American Bank*, this Court stated that § 3701, as amended, provided a "sweeping" exemption for federal obligations, 463 U. S., at 862, and that the word "considered" in the second sentence of § 3701 means "taken into account, or included in the accounting." *Ibid.* Appellant contends that those statements preclude the pro rata deduction approved by the Georgia Supreme Court because they must be read to mean that unless federal obligations are excluded in full from the total assets before net worth is determined, they are "taken into account or included" in the tax computation, and therefore § 3701 is violated.

Contrary to appellant's arguments, however, *American Bank*'s definition of "considered," when read in proper con-

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trative practice. See, *e. g.*, Pa. Stat. Ann., Tit. 72, § 7701.1 (Purdon Supp. 1984–1985); Texas Research League, Status of the Texas Bank Shares Tax, A Report to the Joint Select Committee (of the Texas Legislature) on Fiscal Policy 11–12 (1984).

[5] Another of the three banks, Citizens and Southern National Bank, now has changed its position and has filed a brief *amicus curiae* in support of appellees.

text, does not dispose of the question here. The issue in *American Bank* was whether a bank-share tax is a form of tax to which § 3701 applies. As was noted in *American Bank*, this Court, prior to the 1959 addition to § 3701, consistently had held that § 3701 prohibited taxes imposed on federal obligations, but did not prohibit nondiscriminatory taxes imposed on other property interests such as corporate shares, even though the value of the interest was measured by underlying assets, including federal obligations. 463 U. S., at 858. The 1959 addition "rejected and set aside" that "rather formalistic pre-1959 approach to § 3701." *Id.*, at 862. The 1959 addition made clear that a tax that does not provide an exemption for federal obligations "is barred regardless of its *form* if federal obligations must be considered, either directly or indirectly in *computing* the tax" (emphasis in original). *Ibid.* *American Bank* therefore addressed the forms of taxation that must allow an exemption for federal obligations; it did not examine the scope of the exemption that must be provided.

III

An analysis of the scope of the exemption that § 3701 requires must begin with *Missouri ex rel. Missouri Ins. Co.* v. *Gehner*, 281 U. S. 313 (1930). In that case this Court struck down, as violative of § 3701, a Missouri tax imposed upon the personal property of an insurance company. The tax base at issue in *Gehner* was calculated as follows: (1) the value of tax-exempt bonds held by the insurer was subtracted from total assets to determine total taxable assets; (2) total taxable assets were divided by total assets to obtain the ratio of total taxable assets to total assets; (3) that percentage figure was multiplied by total liabilities; and (4) the pro rata portion of liabilities was subtracted from total taxable assets to determine taxable net worth, upon which the tax was based. The Court held that the pro rata deduction violated § 3701 because it made the ownership of United States bonds the basis for denying a full deduction of liabilities, and thereby increased the tax burden of the taxpayer. The Court drew support for its holding from the recognized principle that "a State may not subject one to a greater burden upon his taxable property merely because he owns tax-exempt government securities." *Id.*, at 321, citing *National Life Ins. Co.* v. *United States*, 277 U. S. 508 (1928).

Justice Stone, in sharp dissent, joined by Justices Holmes and Brandeis, stated that he would have held that the State "does not infringe any constitutional immunity by requiring liabilities to be deducted from all the assets, including tax exempt bonds . . . ." 281 U. S., at 323. He argued that the Court's holding ignored the fact that tax-exempt federal obligations are, in part, liable for the debts of the taxpayer, and that the Court incorrectly assumed that tax-exempt securities alone contributed to the taxpayer's net worth. He also thought the Court's conclusion that the taxpayer's ownership of exempt bonds increased the taxpayer's tax burden was not supportable. He pointed out that a taxpayer who had $200,000 in taxable capital and $100,000 in liabilities had a tax base of $100,000, while a taxpayer who held $100,000 in taxable assets, $100,000 in tax-exempt bonds, and $100,000 in liabilities had a tax base of only $50,000 after the pro rata deduction. The latter taxpayer's liability therefore was reduced, not increased, by ownership of exempt bonds. Justice Stone also pointed out that the full-deduction method adopted by the Court allowed a taxpayer to shelter taxable assets by purchasing an equivalent amount of Government bonds. The full deduction therefore did more than immunize the bonds from taxation; it "confers upon that ownership an affirmative benefit at the expense of the taxing power of the state, by relieving the [taxpayer] from the full burden of taxation on net worth to which his taxable assets have in some measure contributed." *Id.*, at 328.

One must concede that were *Gehner* still an authoritative decision, it would control this case, because it indicates that anything less than a full deduction for federal obligations fails to provide the tax exemption required by § 3701 and the Constitution. *Gehner*, however, has no vitality today, for the Court has adopted the views expressed by Justice Stone. JUSTICE WHITE, writing for a unanimous Court, has stated flatly that *Gehner's* extension of the principles of immunity to "condemn more than an increase in the tax rate on taxable dollars for those owning exempt securities" was "soon repudiated." *United States* v. *Atlas Life Ins. Co.*, 381 U. S. 233, 245 (1965). And just one Term after *Gehner* was decided, the Court upheld provisions of the Revenue Act of 1921 that allowed taxpayers to exclude from gross income interest received on state or municipal obligations, and to take a deduction for interest paid on indebtedness, *except* interest paid on indebtedness incurred or continued to purchase tax-exempt obligations. *Denman* v. *Slayton*, 282 U. S. 514 (1931). In *Denman*, the taxpayer argued that the principles of *National Life Ins. Co.* v. *United States*, *supra*, as reaffirmed and applied in *Gehner*, required that the taxpayer be allowed both an exemption for the interest received on tax-free obligations and a deduction for the interest paid. The Court held to the contrary: "While guaranteed exemptions must be strictly observed, this obligation is not inconsistent with reasonable classification designed to subject all to the payment of their just share of a burden fairly imposed." 282 U. S., at 519. Echoing Justice Stone's *Gehner* dissent, 281 U. S., at 328, the Court noted that under the taxpayer's theory of immunity, he could shelter taxable income by the simple expedient of purchasing exempt obligations with borrowed money and paying interest equivalent to the taxable income. 282 U. S., at 519–520. Similarly, in *Helvering* v. *Independent Life Ins. Co.*, 292 U. S. 371 (1934), the Court upheld provisions of the Revenue Acts of 1921 and 1924 that permitted deduction of depreciation and expenses of buildings owned by life insurance companies only on condition that the company include in its gross income the otherwise nontaxable rental value of the space it occupied. The Court stated that the condition did not amount to a tax upon the tax-exempt rental value, but merely was a permissible "apportionment of expenses." *Id.*, at 381.

In *United States* v. *Atlas Life Ins. Co.*, *supra*, a unanimous Court "affirm[ed] the principle announced in *Denman* and *Independent Life* that the tax laws may require tax-exempt income to pay its way" by upholding the pro rata deduction provisions of the Life Insurance Company Income Tax Act of 1959 (hereinafter Life Insurance Tax Act). 381 U. S., at 247. Under those provisions, a life insurance company's investment income is divided into the policyholders' share, which is not taxed, and the company's share, which is taxed, and a company is allowed to deduct only its share of tax-exempt interest from its gross income. The Court rejected the argument that the insurer should be allowed to deduct not only its share, but the full amount of exempt interest earned, by reasoning like that of the *Gehner* dissent:

> "Undoubtedly the 1959 Act does not wholly ignore the receipt of tax-exempt interest in arriving at taxable investment income. The . . . company will pay more than it would if it had the full benefit of the exclusion for [the policyholders' reserve] and at the same time could reduce taxable income by the full amount of exempt interest. But this result necessarily follows from the application of the principle of charging exempt income with a fair share of the burdens properly allocable to it. In the last analysis Atlas' insistence on both the full reserve and exempt-income exclusions is tantamount to saying that those who purchase exempt securities instead of taxable ones are constitutionally entitled to reduce their tax liability and to pay less tax per taxable dollar than those owning no such securities. The doctrine of intergovernmental immunity does not require such a benefit to be conferred on the ownership of municipal bonds." 381 U. S., at 251.

In sum, ever since *Gehner*, each time this Court has addressed the scope of the tax exemption for Government obligations, it has concluded that the exemption need not be a total exclusion, but, instead, may be limited by charging tax-exempt obligations and interest their fair share of related expenses or burdens.[6] Appellant seeks to avoid the import of these cases by arguing that they were addressed to the tax immunity required by the Constitution, see *Weston* v. *City Council of Charleston*, 2 Pet. 449 (1829), rather than to the requirements of § 3701. It is true that § 3701 was not directly at issue in *Atlas Life*, *Independent Life*, or *Denman*, and that *Atlas Life* did note that *Gehner* had been discredited "insofar as *Gehner* rested on a doctrine of implied constitutional immunity." 381 U. S., at 245, n. 16. But this Court consistently has "treated [§ 3701] as principally a restatement of the constitutional rule." *Memphis Bank & Trust Co.* v. *Garner*, 459 U. S. 392, 397 (1983). See also *Society for Savings* v. *Bowers*, 349 U. S. 143, 144 (1955); *New Jersey Realty Title Ins. Co.* v. *Division of Tax Appeals*, 338 U. S. 665, 672 (1950).

IV

The 1959 addition to § 3701 did not broaden the scope of the exemption required by § 3701 beyond that mandated by the Constitution, as interpreted in *Atlas Life*, *Denman*, and *Independent Life*. The sparse legislative history of the addition certainly provides no support for the assertion that

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[6] This Court, in *Schuylkill Trust Co.* v. *Pennsylvania*, 296 U. S. 113 (1935), struck down a state-trust-company share tax that provided a pro rata deduction for tax-exempt securities. That decision, however, rested on the fact that the tax discriminated against federal obligations by allowing a deduction for the value of shares the trust company held in corporations that already had been taxed or were exempt from taxes, without allowing a like deduction for federal obligations and shares the trust company held in national banks. The Court did not reach the issue whether, *absent* such discrimination, a pro rata deduction for federal obligations would have satisfied the Constitution or § 3701. The decision, therefore, is of no controlling relevance here.

Congress intended to provide a broader exemption. We noted in *American Bank*, 463 U. S., at 865–866, that the catalyst for the amendment was an Idaho tax imposed upon an individual "according to and measured by his net income." See Idaho Code § 63–3011 (1948). Even though this Court had ruled that § 3701 precluded the States from taxing interest on federal obligations, Idaho took the position that it need not exempt the interest received on federal obligations from the "gross income" from which taxable net income was derived. Noting Idaho's stance, the Senate and House Reports on the 1959 addition stated: "The bill . . . makes it clear that the exemption for Federal obligations extends to every form of taxation that would require either the obligation, or the interest on it, or both to be considered directly or indirectly in the computation of the tax." S. Rep. No. 909, 86th Cong., 1st Sess., 8 (1959); H. R. Rep. No. 1148, 86th Cong., 1st Sess., 8 (1959). The discussion of the addition in the ensuing hearings confirms that Congress intended to abolish the formalistic distinction between taxes *on* income and taxes *measured by* income that underlay Idaho's arguments. See Public Debt Ceiling and Interest Rate Ceiling on Bonds, Hearings before the House Committee on Ways and Means, 86th Cong., 1st Sess., 69–72 (1959) (supplemental statement of Secretary of the Treasury Robert B. Anderson). Appellant points to nothing in the legislative history indicating that Congress understood the addition actually to broaden the scope of the exemption, as well as to clarify the forms of taxes to which the exemption applied.

Congress enacted the pro rata deduction upheld in *Atlas Life* just three months before adopting the 1959 addition to § 3701. Its deliberations over the Life Insurance Tax Act included extended debate whether the pro rata deduction included in that Act satisfactorily protected tax-exempt values. See *Atlas Life*, 381 U. S., at 240–242. In deciding that the pro rata deduction was adequate, Congress rejected the argument that *Gehner* prohibited pro rata deductions. Given this almost contemporaneous rejection of arguments founded on *Gehner's* construction of § 3701, see *United States* v. *American Building Maintenance Industries*, 422 U. S. 271, 277 (1975), it does not make sense to assume that, in amending § 3701, Congress intended *sub silentio* to broaden the required exemption to preclude pro rata deductions.[7]

Further, as the *Gehner* dissent, *Denman*, and *Atlas Life* recognized, if banks are allowed to deduct from their assets both federal obligations and the liabilities fairly chargeable to those federal obligations, their ownership will shelter taxable income. In 1959 many, if not most, commercial banks held sufficient federal obligations to shelter their taxable assets completely.[8] Therefore, to presume that Congress intended to prohibit a pro rata deduction in the 1959 addition, we also would have to presume that Congress intended virtually to eliminate the usefulness of share taxes, the prevailing form of state taxation of banks in 1959.[9] We will not infer such an intent from the sparse discussions of Idaho's troublesome income tax that constitute the entire legislative history of the 1959 addition. We hold instead that § 3701, as amended, provides an exemption no broader than that which the Constitution requires.

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[7] It is also worthy of note that the Treasury Department advised Congress that the pro-rata-deduction provisions of the Life Insurance Tax Act of 1959 did not result in the imposition of any tax on the tax-exempt interest insurers received on state and municipal bonds. 105 Cong. Rec. 8402 (1959) (letter from David A. Lindsay, Assistant to the Secretary of the Treasury, to Senator Harry F. Byrd, Chairman of the Senate Committee on Finance). Only a few months later, the same Treasury Department made no mention of any intent to revise § 3701 to prohibit such a pro rata deduction, and, instead, described the addition to § 3701 as intended merely to resolve the controversy over Idaho's attempt to distinguish between a tax on exempt interest and a tax measured by exempt interest. Public Debt Ceiling and Interest Rate Ceiling on Bonds, Hearings before the House Committee on Ways and Means, 86th Cong., 1st Sess., 69–72 (1959) (supplemental statement of Secretary of the Treasury Robert B. Anderson).

[8] In 1960, commercial banks held $61.1 billion in United States Treasury securities, while they had equity capital of only $21 billion. Senate Committee on Banking, Housing and Urban Affairs, Board of Governors of the Federal Reserve System, State and Local Taxation of Banks, Report of a Study Under Public Law 91–156, 92d Cong., 1st Sess., Part III, p. 12 (Comm. Print 1971) (hereinafter Report of a Study).

V

We see no need to depart from the principle established in *Atlas Life* that a pro rata deduction that does no more than allocate to tax-exempt values their "just share of a burden fairly imposed" is constitutional. 381 U. S., at 251. There is little to add to the persuasive arguments for upholding such a pro rata deduction made by Justice Stone in his dissent in *Gehner*, and by JUSTICE WHITE, writing for a unanimous Court in *Atlas Life*.

Appellant asserts that a different rule is required here because allowing a pro rata deduction will decrease the investment attractiveness of federal obligations. See *Smith* v. *Davis*, 323 U. S. 111, 117 (1944). The validity of that proposition, in our view, is highly questionable. Were federal obligations permitted to shelter taxable assets, the States likely would be unable to raise worthwhile revenues through bank share taxes. In that event, one would expect that the States would move to tax banks through franchise or other nonproperty taxes specifically excepted from the proscriptions of § 3701. Counsel for the United States as *amicus curiae* in support of appellant stated at oral argument that the Federal Government does not know if such franchise taxes would result in a greater or lesser burden upon federal obligations. Tr. of Oral Arg. 18. It is far from clear, therefore, that the pro rata deduction would diminish the attractiveness of federal obligations more than the alternative taxes the States would adopt were a full deduction required. Indeed, banks and banking associations have filed briefs as *amici curiae* in support of Georgia's position here, in part because they fear that a decision striking down the pro rata deduction would result in uncertainty and increased costs to the banks as States adopt other forms of taxation. See, *e. g.*, Brief for Pennsylvania Bankers Association, Brief for Virginia Bankers Association, and Brief for Citizens and Southern National Bank. Furthermore, appellant and its *amici* point to no evidence indicating that the difference in cost to the banks between a pro rata deduction and a full deduction is significant enough to prompt banks to forgo the advantages of federal obligations, such as their extreme liquidity and safety, and to invest their money elsewhere. See Brief for Pennsylvania Bankers Association as *Amicus Curiae* 15–18; Brief for Citizens and Southern National Bank as *Amicus Curiae* 8–10.

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[9] In 1958, 27 States imposed bank share taxes and 21 States taxed banks through excise, franchise, or income taxes. S. Leland, The History and Impact of Section 5219 on the Taxation of National Banks, reprinted in Report of a Study 309, 316.

The tax exemption required by the Constitution and § 3701 is not a tax shelter. Federal obligations may be acquired, in part, by liabilities, and, when they are, a pro rata method of allocating a fair share of the federal obligations to liabilities does not infringe upon the constitutional or statutory immunity federal obligations enjoy.

The judgment of the Supreme Court of Georgia is affirmed.

It is so ordered.

WAYTE *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 83-1292. Argued November 6, 1984—Decided March 19, 1985

A July 1980 Presidential Proclamation directed certain young male citizens to register with the Selective Service System during a specified week. Petitioner fell within the prescribed class but did not register. Instead, he wrote letters to Government officials, including the President, stating that he had not registered and did not intend to do so. These letters were added to a Selective Service file of young men who advised that they had failed to register or who were reported by others as having failed to register. Subsequently, Selective Service adopted a policy of passive enforcement under which it would investigate and prosecute only the nonregistration cases contained in this file. In furtherance of this policy, Selective Service in June 1981 sent a letter to each reported nonregistrant warning that a failure to register could result in criminal prosecution. Petitioner received such a letter but did not respond. Thereafter, Selective Service transmitted to the Department of Justice, for investigation and potential prosecution, the names of petitioner and others identified under the passive enforcement policy. The Department of Justice, after screening out those who appeared not to be required to register, referred the remaining names to the Federal Bureau of Investigation and appropriate United States Attorneys. Petitioner's name was one of those so referred. Then, pursuant to the Department of Justice's so-called "beg" policy, whereby United States Attorneys, assisted by the FBI, made an effort to persuade nonregistrants to change their minds, the United States Attorney for petitioner's district sent him a letter urging him to register or face possible prosecution. Again petitioner failed to respond. Nor did he register during an authorized grace period or after further urging by FBI agents to do so. Accordingly, he was indicted for knowingly and willfully failing to register in violation of the Military Selective Service Act. The District Court dismissed the indictment on the ground that the Government had failed to rebut petitioner's prima facie case of selective prosecution. The Court of Appeals reversed, holding that although petitioner had shown that others similarly situated had not been prosecuted for conduct similar to his, he had not shown that the Government focused its investigation on him *because* of his protest activities.

Held: The Government's passive enforcement policy together with its "beg" policy did not violate either the First or Fifth Amendment. Pp. 607–614.

(a) Selective prosecution claims may appropriately be judged according to ordinary equal protection standards. These standards require petitioner to show both that the passive enforcement policy had a discriminatory effect and that it was motivated by a discriminatory purpose. Petitioner has not met this burden. All he has shown is that those eventually prosecuted, along with many not prosecuted, reported themselves as having violated the law. He has not shown that the enforcement policy selected nonregistrants for prosecution on the basis of their speech. The fact that the Government prosecuted those nonregistrants who reported themselves or who were reported by others demonstrates that the Government treated all reported nonregistrants equally, and did not subject vocal nonregistrants to any special burden. But even if the passive policy had a discriminatory effect, petitioner has not shown that the Government intended such a result. Absent a showing that the Government prosecuted petitioner *because* of his protest activities, his claim of selective prosecution fails. Pp. 607–610.

(b) With respect to the First Amendment, Government regulation is justified if (1) it is within the Government's constitutional power, (2) it furthers an important or substantial governmental interest, (3) the governmental interest is unrelated to the suppression of free speech, and (4) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. *United States* v. *O'Brien*, 391 U. S. 367. In this case, neither the first nor third requirement is disputed, and the passive enforcement policy meets both the second and fourth requirements. The reasons the Government offers in defense of the passive enforcement policy—it promotes prosecutorial efficiency, the nonregistrants' letters to Selective Service provided strong evidence of their intent not to comply, and prosecution of visible nonregistrants was an efficient way to promote general deterrence—are sufficiently compelling to satisfy the second requirement as to either those who reported themselves or those who were reported by others. The passive enforcement policy meets the fourth requirement, for it placed no more limitation on speech than was necessary to ensure registration and was the only effective interim solution available to carry out the Government's compelling interest. Pp. 610–614.

710 F. 2d 1385, affirmed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 614.

Mark D. Rosenbaum argued the cause for petitioner. With him on the briefs were *Dan Stormer*, *Mary Ellen Gale*, *Dennis M. Perluss*, *Dan Marmalefsky*, *Laurence H. Tribe*, *William G. Smith*, and *Burt Neuborne*.

Solicitor General Lee argued the cause for the United States. With him on the brief were *Assistant Attorney General Trott*, *Deputy Solicitor General Frey*, *Mark I. Levy*, and *John F. De Pue*.*

JUSTICE POWELL delivered the opinion of the Court.

The question presented is whether a passive enforcement policy under which the Government prosecutes only those who report themselves as having violated the law, or who are reported by others, violates the First and Fifth Amendments.

I

On July 2, 1980, pursuant to his authority under § 3 of the Military Selective Service Act, 62 Stat. 605, as amended, 50 U. S. C. App. § 453,[1] the President issued Presidential Proc-

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**Dennis E. Curtis* filed a brief for the Central Committee for Conscientious Objectors et al. as *amici curiae* urging reversal.

David Crump filed a brief for the Legal Foundation of America as *amicus curiae* urging affirmance.

[1] Section 3 provides in pertinent part:

"[I]t shall be the duty of every male citizen of the United States, and every other male person residing in the United States, who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder."

The United States requires only that young men *register* for military service while most other major countries of the world require actual service. The International Institute for Strategic Studies, The Military Balance 1983–1984 (1983); see *Selective Service System* v. *Minnesota Public Service Research Group*, 468 U. S. 841, 860, n. 2 (1984) (POWELL, J., concurring in part and concurring in judgment).

lamation No. 4771, 3 CFR 82 (1981). This Proclamation directed male citizens and certain male residents born during 1960 to register with the Selective Service System during the week of July 21, 1980. Petitioner fell within that class but did not register. Instead, he wrote several letters to Government officials, including the President, stating that he had not registered and did not intend to do so.[2]

Petitioner's letters were added to a Selective Service file of young men who advised that they had failed to register or who were reported by others as having failed to register. For reasons we discuss, *infra*, at 612–613, Selective Service adopted a policy of passive enforcement under which it would investigate and prosecute only the cases of nonregistration contained in this file. In furtherance of this policy, Selective Service sent a letter on June 17, 1981, to each reported violator who had not registered and for whom it had an address.

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[2] On August 4, 1980, for example, petitioner wrote to both the President and the Selective Service System. In his letter to the President, he stated:

"I decided to obey my conscience rather than your law. I did not register for your draft. I will never register for your draft. Nor will I ever cooperate with yours or any other military system, despite the laws I might break or the consequences which may befall me." App. 714.

In his letter to the Selective Service System, he similarly stated: "I have not registered for the draft. I plan never to register. I realize the possible consequences of my action, and I accept them." *Id.*, at 716.

Six months later, petitioner sent a second letter to Selective Service:

"Last August I wrote to inform you of my intention not to register for the draft. Well, I did not register, and still plan never to do so, but thus far I have received no reply to my letter, much less any news about your much-threatened prosecutions.

"I must interpret your silence as meaning that you are too busy or disorganized to respond to letters or keep track of us draft-age youth. So I will keep you posted of my whereabouts." *Id.*, at 710.

He also stated that, although he would "be traveling the nation . . . encouraging resistance and spreading the word about peace and disarmament," he could be reached at his home address in Pasadena, California. *Id.*, at 710–711.

The letter explained the duty to register, stated that Selective Service had information that the person was required to register but had not done so, requested that he either comply with the law by filling out an enclosed registration card or explain why he was not subject to registration, and warned that a violation could result in criminal prosecution and specified penalties. Petitioner received a copy of this letter but did not respond.

On July 20, 1981, Selective Service transmitted to the Department of Justice, for investigation and potential prosecution, the names of petitioner and 133 other young men identified under its passive enforcement system—all of whom had not registered in response to the Service's June letter. At two later dates, it referred the names of 152 more young men similarly identified. After screening out the names of those who appeared not to be in the class required to register, the Department of Justice referred the remaining names to the Federal Bureau of Investigation for additional inquiry and to the United States Attorneys for the districts in which the nonregistrants resided. Petitioner's name was one of those referred.

Pursuant to Department of Justice policy, those referred were not immediately prosecuted. Instead, the appropriate United States Attorney was required to notify identified nonregistrants by registered mail that, unless they registered within a specified time, prosecution would be considered. In addition, an FBI agent was usually sent to interview the nonregistrant before prosecution was instituted. This effort to persuade nonregistrants to change their minds became known as the "beg" policy. Under it, young men who registered late were not prosecuted, while those who never registered were investigated further by the Government. Pursuant to the "beg" policy, the United States Attorney for the Central District of California sent petitioner a letter on October 15, 1981, urging him to register or face possible prosecution. Again petitioner failed to respond.

On December 9, 1981, the Department of Justice instructed all United States Attorneys not to begin seeking indictments against nonregistrants until further notice. On January 7, 1982, the President announced a grace period to afford nonregistrants a further opportunity to register without penalty. This grace period extended until February 28, 1982. Petitioner still did not register.

Over the next few months, the Department decided to begin prosecuting those young men who, despite the grace period and "beg" policy, continued to refuse to register. It recognized that under the passive enforcement system those prosecuted were "liable to be vocal proponents of nonregistration" or persons "with religious or moral objections." Memorandum of March 17, 1982, from Lawrence Lippe, Chief, General Litigation and Legal Advice Section, Criminal Division, Department of Justice, to D. Lowell Jensen, Assistant Attorney General, Criminal Division, App. 301. It also recognized that prosecutions would "undoubtedly result in allegations that the [case was] brought in retribution for the nonregistrant's exercise of his first amendment rights." *Ibid.* The Department was advised, however, that Selective Service could not develop a more "active" enforcement system for quite some time. See *infra,* at 613. Because of this, the Department decided to begin seeking indictments under the passive system without further delay. On May 21, 1982, United States Attorneys were notified to begin prosecution of nonregistrants. On June 28, 1982, FBI agents interviewed petitioner, and he continued to refuse to register. Accordingly, on July 22, 1982, an indictment was returned against him for knowingly and willfully failing to register with the Selective Service in violation of §§3 and 12(a) of the Military Selective Service Act, 62 Stat. 605 and 622, as amended, 50 U. S. C. App. §§453 and 462(a). This was one of the first indictments returned against any individual under the passive policy.

II

Petitioner moved to dismiss the indictment on the ground of selective prosecution. He contended that he and the other indicted nonregistrants[3] were "vocal" opponents of the registration program who had been impermissibly targeted (out of an estimated 674,000 nonregistrants[4]) for prosecution on the basis of their exercise of First Amendment rights. After a hearing, the District Court for the Central District of California granted petitioner's broad request for discovery and directed the Government to produce certain documents and make certain officials available to testify. The Government produced some documents and agreed to make some Government officials available but, citing executive privilege, it withheld other documents and testimony. On October 29, 1982, the District Court ordered the Government to produce the disputed documents and witness. The Government declined to comply and on November 5, 1982, asked the District Court to dismiss the indictment in order to allow an appeal challenging the discovery order. Petitioner asked for dismissal on several grounds, including discriminatory prosecution.

On November 15, 1982, the District Court dismissed the indictment on the ground that the Government had failed to rebut petitioner's prima facie case of selective prosecution.[5] Following precedents of the Court of Appeals for the Ninth Circuit, the District Court found that in order to establish a prima facie case petitioner had to prove that (i) others similarly situated generally had not been prosecuted for conduct similar to petitioner's and (ii) the Government's discriminatory selection was based on impermissible grounds such as race, religion, or exercise of First Amendment rights. 549 F. Supp. 1376, 1380 (1982). Petitioner satisfied the first requirement, the District Court held, because he had shown that all those prosecuted were "vocal" nonregistrants[6] and because "[t]he inference is strong that the Government could have located non-vocal non-registrants, but chose not to." *Id.*, at 1381. The District Court found the second requirement satisfied for three reasons. First, the passive enforcement program was "'inherently suspect'" because "'it focuse[d] upon the vocal offender . . . [and was] vulnerable to the charge that those chosen for prosecution [were] being punished for their expression of ideas, a constitutionally protected right.'" *Ibid.*, quoting *United States* v. *Steele*, 461

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[3] The record indicates that only 13 of the 286 young men Selective Service referred to the Department of Justice had been indicted at the time the District Court considered this case. As of March 31, 1984, three more men had been indicted. The approximately 270 not indicted either registered, were found not to be subject to registration requirements, could not be found, or were under continuing investigation. The record does not indicate how many fell into each category.

[4] On July 28, 1982, Selective Service stated that 8,365,000 young men had registered out of the estimated 9,039,000 who were required to do so. Selective Service Prosecutions: Oversight Hearing before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, 97th Cong., 2d Sess., 10 (1982). This amounted to a nonregistration rate of approximately 7.5 percent.

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[5] The District Court also decided various statutory and regulatory claims. In particular, it held that Presidential Proclamation No. 4771 had been improperly promulgated and dismissed the indictment on this ground as well. 549 F. Supp. 1376, 1391 (1982). The Court of Appeals for the Ninth Circuit reversed this particular holding and affirmed the District Court's rejection of the remaining regulatory claims. 710 F. 2d 1385, 1388–1389 (1983). Only the constitutional claim is now at issue.

We do not decide the issue the dissent sees as central to this case: "whether Wayte has earned the right to discover Government documents relevant to his claim of selective prosecution." *Post*, at 614–615. Even if there were substance to this discovery issue, it was neither raised in the petition for certiorari, briefed on the merits, nor raised at oral argument. Wayte has simply not asserted such a claim before this Court.

[6] This term is misleading insofar as it suggests that all those indicted had made public statements opposing registration. In some cases, the only statement made by the nonregistrant prior to indictment was his letter to the Government declaring his refusal to register.

F. 2d 1148, 1152 (CA9 1972). Second, the Government's awareness that a disproportionate number of vocal nonregistrants would be prosecuted under the passive enforcement system indicated that petitioner was prosecuted because of his exercise of First Amendment rights. 549 F. Supp., at 1382. Finally, the involvement of high Government officials in the prosecution decisions "strongly suggest[ed] impermissible selective prosecution." *Id.*, at 1383. The District Court then held that the Government had failed to rebut the prima facie case.

The Court of Appeals reversed. 710 F. 2d 1385 (CA9 1983). Applying the same test, it found the first requirement satisfied but not the second. The first was satisfied by petitioner's showing that out of the estimated 674,000 nonregistrants the 13 indicted had all been vocal nonregistrants. *Id.*, at 1387. As to the second requirement, the Court of Appeals held that petitioner had to show that the Government focused its investigation on him *because of* his protest activities. *Ibid.* Petitioner's evidence, however, showed only that the Government was aware that the passive enforcement system would result in prosecutions primarily of two types of men—religious and moral objectors and vocal objectors—and that the Government recognized that the latter type would probably make claims of selective prosecution. Finding no evidence of impermissible governmental motivation, the court held that the District Court's finding of a prima facie case of selective prosecution was clearly erroneous. *Id.*, at 1388. The Court of Appeals also found two legitimate explanations for the Government's passive enforcement system: (i) the identities of nonreported nonregistrants were not known, and (ii) nonregistrants who expressed their refusal to register made clear their willful violation of the law.[7]

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[7] One judge dissented on the ground that the passive enforcement system represented a "deliberate policy . . . designed to punish only those who had communicated their violation of the law to others." 710 F. 2d, at 1389 (Schroeder, J., dissenting). Finding "an enforcement procedure focusing

Recognizing both the importance of the question presented and a division in the Circuits,[8] we granted certiorari on the question of selective prosecution. 467 U. S. 1214 (1984). We now affirm.

III

In our criminal justice system, the Government retains "broad discretion" as to whom to prosecute. *United States* v. *Goodwin*, 457 U. S. 368, 380, n. 11 (1982); accord, *Marshall* v. *Jerrico, Inc.*, 446 U. S. 238, 248 (1980). "[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *Bordenkircher* v. *Hayes*, 434 U. S. 357, 364 (1978). This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake. Judicial supervision in this area, moreover, entails systemic costs of particular concern. Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy. All these are substantial concerns that

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solely upon vocal offenders . . . inherently suspect," *id.*, at 1390, she would have shifted the burden of persuasion on discriminatory intent to the Government.

[8] Compare *United States* v. *Eklund*, 733 F. 2d 1287 (CA8 1984) (en banc) (upholding criminal conviction under passive enforcement scheme), cert. pending, No. 83-1959, with *United States* v. *Schmucker*, 721 F. 2d 1046 (CA6 1983) (ordering hearing on selective prosecution claim), cert. pending, No. 83-2035.

make the courts properly hesitant to examine the decision whether to prosecute.

As we have noted in a slightly different context, however, although prosecutorial discretion is broad, it is not "'unfettered.' Selectivity in the enforcement of criminal laws is . . . subject to constitutional constraints." *United States* v. *Batchelder*, 442 U. S. 114, 125 (1979) (footnote omitted). In particular, the decision to prosecute may not be "'deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification,'" *Bordenkircher* v. *Hayes*, *supra*, at 364, quoting *Oyler* v. *Boles*, 368 U. S. 448, 456 (1962), including the exercise of protected statutory and constitutional rights, see *United States* v. *Goodwin*, *supra*, at 372.

It is appropriate to judge selective prosecution claims according to ordinary equal protection standards.[9] See *Oyler* v. *Boles*, *supra*. Under our prior cases, these standards require petitioner to show both that the passive enforcement system had a discriminatory effect and that it was motivated by a discriminatory purpose.[10] *Personnel Administrator of*

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[9] Although the Fifth Amendment, unlike the Fourteenth, does not contain an equal protection clause, it does contain an equal protection component. *Bolling* v. *Sharpe*, 347 U. S. 497, 499 (1954). "[Our] approach to Fifth Amendment equal protection claims has . . . been precisely the same as to equal protection claims under the Fourteenth Amendment." *Weinberger* v. *Wiesenfeld*, 420 U. S. 636, 638, n. 2 (1975).

[10] A showing of discriminatory intent is not necessary when the equal protection claim is based on an overtly discriminatory classification. See *Strauder* v. *West Virginia*, 100 U. S. 303 (1880). No such claim is presented here, for petitioner cannot argue that the passive policy discriminated on its face.

The dissent argues that Wayte made a nonfrivolous showing of all three elements of a prima facie case as established in the context of grand jury selection. *Castaneda* v. *Partida*, 430 U. S. 482, 494–495 (1977). Neither the parties nor the courts below, however, discussed the prima facie case in these terms. Rather, they used the phrase to refer to whether Wayte had made a showing, which, if unrebutted, would directly establish discriminatory effect and purpose. Even applying standards from the grand

Massachusetts v. *Feeney*, 442 U. S. 256 (1979); *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252 (1977); *Washington* v. *Davis*, 426 U. S. 229 (1976). All petitioner has shown here is that those eventually prosecuted, along with many not prosecuted, reported themselves as having violated the law. He has not shown that the enforcement policy selected nonregistrants for prosecution on the basis of their speech. Indeed, he could not have done so given the way the "beg" policy was carried out. The Government did not prosecute those who reported themselves but later registered. Nor did it prosecute those who protested registration but did not report themselves or were not reported by others. In fact, the Government did not even investigate those who wrote letters to Selective Service criticizing registration unless their letters stated affirmatively that they had refused to comply with the law. Affidavit of Edward A. Frankle, Special Assistant to the Director of Selective Service for Compliance, App. 635. The Govern-

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jury selection context, however, we believe that Wayte has failed to establish a prima facie case. For example, although the dissent describes the first element as merely whether the individual "is a member of a recognizable, distinct class," *post*, at 626, it is clear for reasons we discuss, *infra*, at this page and 610, that Wayte has not established the first element as actually defined by *Castaneda:* whether the individual is a member of an "identifiable group" that is "a recognizable, distinct class, *singled out for different treatment under the laws, as written or as applied.*" 430 U. S., at 494 (emphasis added). For these same reasons, we believe Wayte has failed to establish the other *Castaneda* elements, particularly the third. Furthermore, even assuming that Wayte did make out this kind of prima facie case, the "beg" policy would rebut it.

The dissent also argues that *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886), would have been decided differently under the approach we take today. *Post*, at 630–631. This misunderstanding stems from its belief that "the Government intentionally discriminated in defining the pool of potential prosecutees" in this case. *Post*, at 630. This premise, however, mistakes the facts. The prosecution pool consisted of all reported nonregistrants, not just "vocal" nonregistrants, and there is no evidence of Government intent to prosecute individuals because of their exercise of First Amendment rights.

ment, on the other hand, did prosecute people who reported themselves or were reported by others but who did not publicly protest. These facts demonstrate that the Government treated all reported nonregistrants similarly. It did not subject vocal nonregistrants to any special burden. Indeed, those prosecuted in effect selected themselves for prosecution by refusing to register after being reported and warned by the Government.

Even if the passive policy had a discriminatory effect, petitioner has not shown that the Government intended such a result. The evidence he presented demonstrated only that the Government was aware that the passive enforcement policy would result in prosecution of vocal objectors and that they would probably make selective prosecution claims. As we have noted, however: "'Discriminatory purpose' . . . implies more than . . . intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Administrator of Massachusetts* v. *Feeney*, *supra*, at 279 (footnotes and citations omitted). In the present case, petitioner has not shown that the Government prosecuted him *because of* his protest activities. Absent such a showing, his claim of selective prosecution fails.

IV

Petitioner also challenges the passive enforcement policy directly on First Amendment grounds.[11] In particular, he claims that "[e]ven though the [Government's passive] enforcement policy did not overtly punish protected speech as such, it inevitably created a content-based regulatory system with a concomitantly disparate, content-based impact on nonregistrants."[12] Brief for Petitioner 23. This Court has held that when, as here, "'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *United States* v. *O'Brien*, 391 U. S. 367, 376 (1968). Government regulation is justified

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[11] Petitioner alleges that the passive enforcement policy violated both his right to free speech and his right to petition. Because he does not argue that it burdened each right differently, we view these claims as essentially the same. Although the right to petition and the right to free speech are separate guarantees, they are related and generally subject to the same constitutional analysis. See *NAACP* v. *Claiborne Hardware Co.*, 458 U. S. 886, 911–915 (1982).

> "if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.*, at 377.

Accord, *Seattle Times Co.* v. *Rhinehart*, 467 U. S. 20, 32 (1984); *Procunier* v. *Martinez*, 416 U. S. 396, 413 (1974). In the present case, neither the first nor third condition is disputed.

There can be no doubt that the passive enforcement policy meets the second condition. Few interests can be more compelling than a nation's need to ensure its own security.

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[12] As an initial matter, we note doubt that petitioner has demonstrated injury to his First Amendment rights. The Government's "beg" policy removed most, if not all, of any burden passive enforcement placed on free expression. Because of this policy, nonregistrants could protest registration and still avoid any danger of prosecution. By simply registering after they had reported themselves to the Selective Service, nonregistrants satisfied their obligation and could thereafter continue to protest registration. No matter how strong their protest, registration immunized them from prosecution. Strictly speaking, then, the passive enforcement system penalized continued violation of the Military Selective Service Act, not speech. The only right it burdened was the asserted "right" not to register, a "right" without foundation either in the Constitution or the history of our country. See *Selective Draft Law Cases*, 245 U. S. 366 (1918).

It is well to remember that freedom as we know it has been suppressed in many countries. Unless a society has the capability and will to defend itself from the aggressions of others, constitutional protections of any sort have little meaning. Recognizing this fact, the Framers listed "provid[ing] for the common defence," U. S. Const., Preamble, as a motivating purpose for the Constitution and granted Congress the power to "provide for the common Defence and general Welfare of the United States," Art. I, § 8, cl. 1. See also The Federalist Nos. 4, 24, and 25. This Court, moreover, has long held that the power "to raise and support armies . . . is broad and sweeping," *United States* v. *O'Brien*, *supra*, at 377; accord, *Lichter* v. *United States*, 334 U. S. 742, 755–758 (1948); *Selective Draft Law Cases*, 245 U. S. 366 (1918), and that the "power . . . to classify and conscript manpower for military service is 'beyond question,'" *United States* v. *O'Brien*, *supra*, at 377, quoting *Lichter* v. *United States*, *supra*, at 756; accord, *Selective Draft Law Cases*, *supra*. With these principles in mind, the three reasons the Government offers in defense of this particular enforcement policy are sufficiently compelling to satisfy the second *O'Brien* requirement—as to either those who reported themselves or those who were reported by others.

First, by relying on reports of nonregistration, the Government was able to identify and prosecute violators without further delay. Although it still was necessary to investigate those reported to make sure that they were required to register and had not, the Government did not have to search actively for the names of these likely violators. Such a search would have been difficult and costly at that time. Indeed, it would be a costly step in any "active" prosecution system involving thousands of nonregistrants. The passive enforcement program thus promoted prosecutorial efficiency. Second, the letters written to Selective Service provided strong, perhaps conclusive evidence of the nonregistrant's intent not to comply—one of the elements of the offense.[13] Third, prosecuting visible nonregistrants was thought to be an effective way to promote general deterrence, especially since failing to proceed against publicly known offenders would encourage others to violate the law.

The passive enforcement policy also meets the final requirement of the *O'Brien* test, for it placed no more limitation on speech than was necessary to ensure registration for the national defense. Passive enforcement not only did not subject "vocal" nonregistrants to any special burden, *supra,* at 609–610, but also was intended to be only an interim enforcement system. Although Selective Service was engaged in developing an active enforcement program when it investigated petitioner, it had by then found no practicable way of obtaining the names and current addresses of likely nonregistrants.[14] Eventually, it obtained them by matching state driver's license records with Social Security files. It took some time, however, to obtain the necessary authorizations and to set up this system. Passive enforcement was the only effective interim solution available to carry out the Government's compelling interest.

We think it important to note as a final matter how far the implications of petitioner's First Amendment argument would extend. Strictly speaking, his argument does not concern passive enforcement but self-reporting. The concerns he identifies would apply to all nonregistrants who report themselves even if the Selective Service engaged only in active enforcement. For example, a nonregistrant who wrote a letter informing Selective Service of his failure to register could, when prosecuted under an active system, claim that the Selective Service was prosecuting him only because of his "protest." Just as in this case, he could have some justification for believing that his letter had focused inquiry upon him. Prosecution in either context would equally "burden" his exercise of First Amendment rights. Under the petitioner's view, then, the Government could not constitutionally prosecute a self-reporter—even in an active enforcement system—unless perhaps it could prove that it would have prosecuted him without his letter. On principle, such a view would allow any criminal to obtain immunity from prosecution simply by reporting himself and claiming that he did so in order to "protest" the law. The First Amendment confers no such immunity from prosecution.

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[13] Section 12(a) of the Military Selective Service Act, 62 Stat. 622, as amended, 50 U. S. C. App. § 462(a), provides that a criminal nonregistrant must "evad[e] or refus[e]" to register. For conviction, the courts have uniformly required the Government to prove that the failure to register was knowing. *E. g., United States* v. *Boucher,* 509 F. 2d 991 (CA8 1975); *United States* v. *Rabb,* 394 F. 2d 230 (CA3 1968). Neither party contests this requirement here.

[14] Selective Service had tried to use Social Security records but found that the addresses there were hopelessly stale. And under the law, 26 U. S. C. § 6103, it could gain no useful access to Internal Revenue Service records—the only other recognized federal source of generally accurate information.

V

We conclude that the Government's passive enforcement system together with its "beg" policy violated neither the First nor Fifth Amendment. Accordingly, we affirm the judgment of the Court of Appeals.

It is so ordered.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

The Court decides today that petitioner "has not shown that the Government prosecuted him *because of* his protest activities," and it remands to permit his prosecution to go forward. However interesting the question decided by the Court may be, it is not necessary to the disposition of this case. Instead, the issue this Court must grapple with is far less momentous but no less deserving of thoughtful treatment. What it must decide is whether Wayte has earned the right to discover Government documents relevant to his claim of selective prosecution.

The District Court ordered such discovery, the Government refused to comply, and the District Court dismissed the indictment. The Court of Appeals reversed on the grounds that Wayte had failed to prevail on the merits of his selective prosecution claim, and that the discovery order was improper. If Wayte is entitled to obtain evidence currently in the Government's possession, the Court cannot dismiss his claim on the basis of only the evidence now in the record. To prevail here, then, all that Wayte needs to show is that the District Court applied the correct legal standard and did not abuse its discretion in determining that he had made a nonfrivolous showing of selective prosecution entitling him to discovery.

There can be no doubt that Wayte has sustained his burden. Therefore, his claim cannot properly be dismissed at this stage in the litigation. I respectfully dissent from this Court's decision to do so.

I

In order to understand the precise nature of the legal question before this Court, it is important to review in some detail the posture in which this case comes to us. In July 1982, an indictment filed in the District Court for the Central District of California charged Wayte with knowingly and willfully failing to register for the draft. In September 1982, Wayte moved to have the indictment dismissed on the ground of selective prosecution.

In support of his claim, he presented 10 exhibits: 7 internal Justice Department memoranda discussing the mechanism for the prosecution of individuals who failed to register for the draft, a report by the United States General Accounting Office discussing alternatives to the registration program, a statement by the Director of Selective Service before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Judiciary Committee, and a transcript of a meeting of the Department of Defense's Military Manpower Task Force. According to Wayte, this evidence supported his claim that the Government had designed a prosecutorial scheme that purposefully discriminated against those who had chosen to exercise their First Amendment right to oppose draft registration. Wayte argued that he had demonstrated sufficient facts on his claim of selective prosecution to be entitled to an evidentiary hearing on that issue. In this regard, Wayte moved to discover a variety of Government documents that he asserted were relevant to his selective prosecution claim, and indicated his intention to subpoena seven out-of-district witnesses, including Edwin Meese III, the Counsellor to the President.

On September 30, 1982, the District Court found that the motion to dismiss the indictment on the ground of selective prosecution was "non-frivolous." The following day, it held a hearing in which the parties presented their disagreements over Wayte's discovery requests. The District Court granted some of Wayte's requests, denied others, and ordered the Government to submit some documents for *in camera* inspection. At a hearing on October 5, the District Court denied the Government's motion for reconsideration of the discovery order and postponed ruling on the requested subpoenas until after a preliminary evidentiary hearing on Wayte's selective prosecution claim.

This hearing was held on October 7. Two witnesses testified: David J. Kline, a Senior Legal Advisor at the Justice Department's Criminal Division, and Richard Romero, an Assistant United States Attorney in the Central District of California and the principal prosecutor in Wayte's case. Kline's testimony dealt extensively with the Justice Department's policies for prosecuting individuals who violated the draft-registration statute.

At a nonevidentiary hearing on October 15, the District Court ruled that portions of three of the many documents that had been submitted *in camera* should be turned over to the defense. The three documents in question had previously been given to the defense in expurgated fashion. As to certain parts of them, however, the District Court determined that the defense's need for the still undisclosed materials outweighed the Government's interest in nondisclosure. Specifically, the District Court ordered disclosure of two sentences and one paragraph in one letter, and one paragraph in each of two memoranda. The District Court also indicated that some of the documents submitted for *in camera* review had been redacted in a manner that made them incomprehensible.

The Government was less than eager to comply with the District Court's order of October 15. The Government's response to that order indicated, in a paragraph that was later stricken at the Government's request following an admonishment by the District Court:

> "It is obvious that the Court's appetite for more and more irrelevant disclosures of sensitive information has become insatiable. It is also apparent that with each new disclosure, made pursuant to near-impossible deadlines, the court feels compelled to impugn the motives of the Government." Record, Doc. No. 95, p. 3.

The Government invoked a "deliberative processes" privilege for documents that it had turned over to the District Court for *in camera* review. It also refused to allow Meese's testimony, on the ground that all information on which he could testify was privileged.

The saga continued on October 20, when the District Court ordered the production, for *in camera* review, of unredacted versions of documents that had previously been submitted in redacted form. The Government eventually complied with that order.

On October 29, the District Court ordered that certain portions of those documents be turned over to the defense. The list of documents was kept under seal. The District Court applied the standard for determining whether an assertion of executive privilege is valid announced in *United States* v. *Nixon*, 418 U. S. 683, 711 (1974). The court determined:

> "Applying the balancing test from *Nixon* to the facts, this court finds that the scales of justice tip decidedly in favor of the defendant's right to review several of the documents which this court has inspected *in camera*. The Government's generalized assertion of a 'deliberative process' executive privilege must yield to the defendant's specific need for for documents, which this court has determined must be released to Mr. Wayte." Record, Doc. No. 119, p. 5.

In the same order, the District Court also granted Wayte's request that Meese be ordered to testify at an evidentiary hearing. In this connection, the District Court made a series of findings: (1) that the Government's normal prosecutorial policies were not being followed for the prosecution of nonregistrants; (2) that Meese served as a nexus between the White House and the Justice Department on this issue; and (3) that Meese had been directly involved in decisions involving the Government's prosecutorial policies toward nonregistrants. It therefore determined that his testimony was relevant to Wayte's claim.

The Government refused to comply with the District Court's order of October 29. It explained:

> "[I]t is our position that important governmental interests are at stake in connection with our claim of privilege, which we sincerely believe have not been shown to be overridden in this case. Nor can we concur in the Court's conclusion that a sufficient basis has been established to justify requiring the appearance and testimony of an official as senior as the Counsellor to the President. Contrary to the Court's finding in its Order of October 29, 1982, we believe that the record amply demonstrates that decisions relating to the prosecution of nonregistrants were made within the Department of Justice and

> that there is, therefore, no nexus between the White House and the selection of the defendant for prosecution." Record, Doc. No. 123, p. 3.

The District Court held its last hearing on this matter on November 15. In an order and opinion filed that day, the District Court dismissed Wayte's indictment. 549 F. Supp. 1376 (1982). It found, first, that Wayte had alleged sufficient facts on his selective prosecution claim "to take the question beyond the frivolous stage," *id.*, at 1379 (citing *United States* v. *Erne*, 576 F. 2d 212, 216 (CA9 1978)), and thus had earned the right to discover relevant Government documents. Second, it found that the Government had refused to comply with the discovery order of October 29 and that it was the Government's position that "the only way to achieve appellate review of the Government's assertion of executive privilege is for the court to dismiss the indictment against the defendant." 549 F. Supp., at 1378–1379; see *Alderman* v. *United States*, 394 U. S. 165, 181 (1969) ("[D]isclosure must be made even though attended by potential danger to the reputation or safety of third parties or to the national security—unless the United States would prefer dismissal of the case to disclosure of the information").

Having made these findings, the District Court turned to the merits of Wayte's underlying claim. It found that Wayte had gone beyond satisfying the standard for obtaining discovery, and that he had in fact made out a prima facie case of selective prosecution. 549 F. Supp., at 1379–1380. As a result, the burden shifted to the Government to prove that its policy was not based on impermissible motives. The District Court found that the Government had failed to rebut Wayte's prima facie case. *Id.*, at 1382–1385.

On appeal to the Court of Appeals for the Ninth Circuit, the Government conceded that "[t]he event that triggered dismissal for selective prosecution was the government's declination, following the surrender of Presidential documents to the court, to comply with orders directing that certain of these documents be furnished to the defense and that Presidential Counsellor Edwin Meese be made available as a witness." Brief for United States in No. 82–1699 (CA9), p. 42. The Government gave two reasons for its refusal to comply with the District Court's order. First, it maintained that Wayte "did not even meet the colorable basis test so as to trigger a discovery obligation on the part of the government." *Id.*, at 44. Second, it argued that Wayte had not shown that he had a particularized need for the privileged materials that was sufficiently substantial to outweigh the asserted need to preserve confidentiality. *Id.*, at 45. The Government acknowledged that the District Court had applied the correct standard for evaluating claims of privilege—that set out in *United States* v. *Nixon*, *supra*. The Government, however, disagreed with the manner in which the District Court had weighed the relevant factors.

In his brief to the Ninth Circuit, Wayte argued that one independent basis for the dismissal of the indictment was that the Government had refused to comply with the District Court's lawful discovery orders. Brief for Appellee in No. 82–1699 (CA9), pp. 20–31. Wayte's brief clearly stated that "the indictment could properly have been dismissed on that basis alone." *Id.*, at 20. In this connection, Wayte argued that he had alleged sufficient facts to take his selective prosecution claim beyond the frivolous stage, that the District Court's orders concerned materials that were relevant to that claim, that the propriety of discovery orders must be reviewed under an abuse of discretion standard, that the District Court had not abused its discretion in ordering discovery in this case, and that the District Court properly rejected the Government's claim of privilege.

A divided panel of the Court of Appeals for the Ninth Circuit reversed the dismissal of Wayte's indictment. 710 F. 2d 1385 (1983). Writing for the majority, Judge Wright focused primarily on the merits of the underlying selective prosecution claim. He concluded that, on the record before the court, Wayte had failed to show that he was selected for prosecution "because of his exercise of his constitutional rights." *Id.*, at 1387.

The Court of Appeals dealt with the Government's failure to comply with the discovery order in only one brief paragraph:

> "Because Wayte made no initial showing of selective prosecution, he was not entitled to discovery of government documents. That access to the documents might have been helpful to him does not in itself entitle him to discovery. The government's refusal to comply with the discovery orders was justified." *Id.*, at 1388 (citations omitted).

In an unsuccessful petition for rehearing, Wayte argued that the majority had overlooked the standard of review applicable to trial court discovery orders. Pet. for Rehearing and Suggestion of Appropriateness of Rehearing en Banc in No. 82–1699 (CA9), pp. 8–10. Wayte renewed his selective prosecution arguments before this Court. See Pet. for Cert. 9–12; Tr. of Oral Arg. 9–11.

II

A

This streamlined account of the stormy proceedings below makes clear that, from a legal perspective, this case is first and foremost a discovery dispute. If the District Court correctly resolved the discovery issue, Wayte was entitled to additional evidence. And if he was entitled to additional evidence, the Court cannot reject his claim on the merits, on the basis of only the evidence to which Wayte had access at the time of the District Court proceedings.[1]

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[1] The Court expressly refuses to consider the question whether Wayte has earned the right to discover relevant Government documents; it maintains that this claim was not properly asserted here. See *ante*, at 605, n. 5. That conclusion is quite surprising. The grant of certiorari in this

The question of whether the discovery order was appropriate breaks down into three narrower inquiries. The first is whether Wayte made a sufficient showing of selective pros-

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case was limited to "Question 1 presented by the petition," 467 U. S. 1214 (1984), which focused on a conflict among the Federal Circuits. Wayte offered only one reason for granting certiorari on that question:

> "The *direct conflict* between the Sixth and Ninth Circuits on an issue concerning the exercise of First Amendment rights particularly in view of the pending prosecutions in other circuits raising the identical question, justifies the grant of certiorari to review the judgment below." Pet. for Cert. 12 (emphasis added).

In the case to which Wayte referred, the Sixth Circuit had held that the defendant was "entitled to a hearing on his charge of selective prosecution." *United States* v. *Schmucker*, 721 F. 2d 1046, 1048 (1983). Given that the lower courts have applied the same standard for granting discovery orders and evidentiary hearings in this area, the Sixth Circuit's holding also would entitle the defendant in that case to discovery, and the Sixth Circuit's holding therefore is in "direct conflict" with the Ninth Circuit's holding that Wayte was not entitled to discovery. Compare, *e. g.*, *United States* v. *Berrios*, 501 F. 2d 1207, 1211 (CA2 1974), with *United States* v. *Erne*, 576 F. 2d 212, 216 (CA9 1978). The discovery question could not have been raised more clearly in the lower courts and, contrary to the Court's suggestion, it is squarely presented.

In addition, to the extent that the Court chooses to address the merits of Wayte's selective prosecution claim, *ante*, at 607–610, it must also decide the antecedent discovery question. First, the merits of that constitutional claim, which were not briefed before this Court, are certainly no better presented than Wayte's discovery claim. Second, it makes little sense to decide whether, at the time that the Government chose to ignore the District Court's discovery order, Wayte had amassed sufficient evidence to prove that the Government acted in a discriminatory manner. The threshold question is, of course, whether Wayte presented enough evidence of a constitutional violation to be entitled to documents in the Government's possession. If he was entitled to such discovery, the merits should not be addressed until the record is complete.

Finally, it is curious that the Court here professes such concern about whether the discovery issue was properly presented. Indeed, the Court chooses to address Wayte's claim that the prosecution scheme placed a direct burden on the exercise of First Amendment rights. *Ante*, at 610–614. That claim was not presented or ruled upon by the District Court, was not presented or ruled upon on appeal, and was not raised in Wayte's petition for certiorari. To the extent that the Court discusses that claim on the ecution to be entitled to any discovery. The second is whether the documents and testimony ordered released were relevant to Wayte's selective prosecution claim, that is, whether the scope of discovery was appropriate. The third is whether Wayte's need for the materials outweighed the Government's assertion of executive privilege. The Court of Appeals dealt with only the first of these questions, finding that an adequate showing had not been made. Thus, if that decision is incorrect, the proper disposition of this case is a remand to the Court of Appeals for a determination of the second and third questions. Certainly this Court is in no position to perform those inquiries, as the documents at stake, which were submitted to the District Court for *in camera* review, are not before us.

B

A two-part inquiry leads to the resolution of the narrow discovery question before this Court: (1) what showing must a defendant make to obtain discovery on a claim of selective prosecution, and (2) under what standard does an appellate court review a district court's finding that the required showing was made.

The Courts of Appeals have adopted a standard under which a defendant establishes his right to discovery if he can show that he has a "colorable basis" for a selective prosecution claim. See, *e. g.*, *United States* v. *Murdock*, 548 F. 2d 599, 600 (CA5 1977); *United States* v. *Cammisano*, 546 F. 2d 238, 241 (CA8 1976); *United States* v. *Berrios*, 501 F. 2d 1207, 1211 (CA2 1974); *United States* v. *Berrigan*, 482 F. 2d 171, 181 (CA3 1973). To make this showing, a defendant must allege sufficient facts in support of his selective prosecution claim "to take the question past the frivolous state." *United States* v. *Hazel*, 696 F. 2d 473,

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ground that all of Wayte's constitutional claims are interrelated, it must also discuss the threshold constitutional claim: Whether Wayte made a sufficient showing of a constitutional violation to be entitled to discovery.

475 (CA6 1983); *United States* v. *Erne*, 576 F. 2d, at 216. In general, a defendant must present "some evidence tending to show the existence of the essential elements of the defense." *United States* v. *Berrios*, *supra*, at 1211.

This standard, which the District Court applied in this case, is consistent with our exhortation that "[t]he need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts." *United States* v. *Nixon*, 418 U. S., at 709. It also recognizes that most of the relevant proof in selective prosecution cases will normally be in the Government's hands. Cf. *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U. S. 464, 473 (1962). At the same time, the standard adequately protects the Government from attempts by the defense to seek discovery as a means of harassment or of delay. See *United States* v. *Murdock*, *supra*, at 600.

With respect to the second determination, which concerns the appropriate scope of review, there is no doubt that trial judges should enjoy great deference in discovery matters. District court decisions on discovery are therefore not subject to plenary review on appeal, but are instead reviewed under an abuse-of-discretion standard. As we stated in *United States* v. *Nixon:*

> "Enforcement of a pretrial subpoena *duces tecum* must necessarily be committed to the sound discretion of the trial court since the necessity for the subpoena most often turns upon a determination of factual issues. Without a determination of arbitrariness or that the trial court finding was without record support, an appellate court will not ordinarily disturb a finding that the applicant for a subpoena complied with [Federal Rule of Criminal Procedure] 17(c)." 418 U. S., at 702.

The abuse-of-discretion standard acknowledges that appellate courts in general, and this Court in particular, should not expend their limited resources making determinations that can profitably be made only at the trial level. Cf. *Anderson* v. *Bessemer City, ante,* at 573–576; *Florida* v. *Rodriguez,* 469 U. S. 1, 12 (1984) (STEVENS, J., dissenting).

The Court of Appeals below, however, did not even mention the appropriate standard of review, much less explain how to apply it. To the extent that its conclusory statements shed any light on the basis for its decision, it appears that the Court of Appeals performed a *de novo* inquiry. Such review is especially inappropriate in this case, given the painstaking care that the District Court took in supervising the discovery process, and the narrowly tailored scope of its rulings.

III

The proper starting point, then, is to consider whether the District Court abused its discretion in determining that Wayte had presented sufficient facts to support a nonfrivolous claim of selective prosecution. I believe that the District Court acted well within the scope of its discretion.

To evaluate the merit of Wayte's claim, I consider the elements of a prima facie case of selective prosecution and ascertain whether Wayte has made a nonfrivolous showing as to the existence of these elements. It is important to bear in mind at this stage that Wayte need not have made out a full prima facie case in order to be entitled to discovery. A prima facie case, of course, is one that if unrebutted will lead to a finding of selective prosecution. It shifts to the Government the burden of rebutting the presumption of unconstitutional action. See *Rose* v. *Mitchell,* 443 U. S. 545, 565 (1979); *Duren* v. *Missouri,* 439 U. S. 357, 368 (1979); *Castaneda* v. *Partida,* 430 U. S. 482, 495 (1977); *Alexander* v. *Louisiana,* 405 U. S. 625, 631–632 (1972). But a defendant need not meet this high burden just to get discovery; the standard for discovery is merely nonfrivolousness.

Moreover, Wayte need not convince this Court, as he had no need to persuade the Court of Appeals, that it would have made a finding of nonfrivolousness itself if it had sat as a finder of fact. All that he needs to show is that the District Court's finding of nonfrivolousness did not constitute an abuse of discretion. See *United States* v. *Cammisano*, 546 F. 2d, at 242; *United States* v. *Berrios*, 501 F. 2d, at 1211–1212. I turn, then, to consider whether a sufficient showing was made.

The Court correctly points out that Wayte's selective prosecution claims must be judged according to ordinary equal protection standards. *Ante*, at 608; see *Oyler* v. *Boles*, 368 U. S. 448, 456 (1962); *Yick Wo* v. *Hopkins*, 118 U. S. 356, 373 (1886). Wayte presents an equal protection challenge to the "passive" enforcement system, under which Selective Service refers to the Justice Department for further investigation and possible prosecution *only* the "names of young men who fall into two categories: (1) those who wrote to Selective Service and said that they refused to register and (2) those whose neighbors and others reported them as persons who refused to register." App. 239. Wayte argues that the scheme purposefully singled out these individuals as a result of their exercise of First Amendment rights. See Brief for Appellee in No. 82–1699 (CA9), pp. 3–8, 11–20.

To make out a prima facie case, Wayte must show first that he is a member of a recognizable, distinct class. Second, he must show that a disproportionate number of this class was selected for investigation and possible prosecution. Third, he must show that this selection procedure was subject to abuse or was otherwise not neutral. *Castaneda* v. *Partida*, *supra*, at 494. The inquiry then is whether Wayte has presented sufficient evidence as to each of the elements to show that the claim is not frivolous.

Wayte has clearly established the first element of a prima facie case. The record demonstrates unequivocally that Wayte is a member of a class of vocal opponents to the Government's draft registration program. All members of that class exercised a First Amendment right to speak freely and to petition the Government for a redress of grievances, and either reported themselves or were reported by others as having failed to register for the draft.

To establish the second element, Wayte must show that the "passive" enforcement policy identified for investigation and possible prosecution a disproportionate number of vocal opponents of draft registration. The record, as it stands given the Government's refusal to comply with the District Court's discovery order, does not contain a breakdown of how many of the approximately 300 young men referred by Selective Service to the Justice Department were "vocal." However, the record suggests that responsible officials in the Justice Department were aware that the vast majority of these individuals would be vocal opponents of draft registration.

For example, a draft letter prepared by David J. Kline, the Justice Department official responsible for overall enforcement of the draft registration law, for Assistant Attorney General Jensen to send to Herbert C. Puscheck, Selective Service's Associate Director for plans and operations, stated:

> "Unfortunately, we believe that if the government initiates prosecutions with only the present passive identification scheme in place, there exists a real risk that the United States will lose at least a few of those initial cases. There is a high probability that persons who write to the Service and that persons who are reported by others are vocal proponents of non-registration. Since a passive identification scheme necessarily means that there will be enormous numbers of non-registrants who are neither identified nor prosecuted, a prosecution of a vocal non-registrant will undoubtedly lead to claims that the prosecution is brought in retribution for the non-registrant's exercise of his first amendment rights. *Indeed, with the present univers[e] of hundreds of thousands of non-registrants, the chances that a quiet non-registrant will be prosecuted is probably about the*

> *same as the chances that he will be struck by lightning.*" App. 290–291 (emphasis added; citation omitted).

Similarly a memorandum from Jensen to various United States Attorney's Offices states:

> "Selective Service's enforcement program is presently 'passive.' Non-registrants are brought to the Service's attention either when they report themselves or when others report them. Consequently, the first prosecutions are liable to consist of a large sample of (1) persons who object on religious and moral grounds and (2) persons who publicly refuse to register." *Id.*, at 361–362.

Perhaps, by itself, this evidence would not suffice to establish the second element of a prima facie case. However, it is more than adequate to make nonfrivolous the claim that the "passive" enforcement scheme identified for possible prosecution a disproportionate number of vocal opponents of draft registration.

As to the third element, the decision to implement the "passive" enforcement system was certainly a decision susceptible to abuse. "This is indeed an exceptional area of national life where conscientious opposition to government policy has been intertwined with violations of the laws which implement the policy." *United States* v. *Falk*, 479 F. 2d 616, 625 (CA7 1973) (en banc) (Fairchild, J., concurring). The correlation between vocal opposition and violations of the law makes it relatively easy to punish speech under the guise of enforcing the laws.

Here, the enforcement scheme was implemented with full knowledge that its effects would be particularly harsh on vocal opponents of the Government's policies. See App. 290–291, 361–362 (quoted *supra*, at 627 and this page); cf. 549 F. Supp., at 1384 (Government "recognized the passive program had potentially serious first amendment problems"). Such knowledge makes the scheme directly vulnerable to the charge that its purpose was to punish individuals for the exercise of their

First Amendment rights. This Court has recognized that "[a]dherence to a particular policy or practice, 'with full knowledge of the predictable effects of such adherence . . . is one factor among others which may be considered by a court'" in determining whether a decision was based on an impermissible ground. *Columbus Board of Education* v. *Penick*, 443 U. S. 449, 465 (1979); see also *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U. S. 256, 279, n. 25 (1979); *id.*, at 283 (MARSHALL, J., dissenting) ("To discern the purposes underlying facially neutral policies, this Court has . . . considered the . . . foreseeability of any disproportionate impact"); *United States* v. *Steele*, 461 F. 2d 1148, 1152 (CA9 1972).

Thus, Wayte has established the first and third elements of a prima facie case, and has presented a colorable claim as to the second.[2] As a result, there can thus be no doubt that the District Court did not abuse its discretion when it found that Wayte's equal protection claim was not frivolous.

The Court, of course, has not viewed this case through the same lens. Instead of focusing on the elements of a prima facie case, and on whether Wayte presented sufficient evidence as to the existence of each of these elements to earn the right to discover relevant information in the Government's possession, the Court leaps over these two issues and proceeds directly to the merits of the equal protection claim. The Court's analysis is flawed in two respects. First, as I have shown, the Court ignores the simple fact that, if Wayte is entitled to discovery, his claim cannot be rejected on the merits for lack of evidence.

Second, and of equal importance, the Court errs in the manner in which it analyzes the merits of the equal protection claim. It simply focuses on the wrong problem when it states that "the Government treated all reported nonregistrants similarly" and that "those prosecuted in effect selected themselves for prosecution by refusing to register after being reported and warned by the Government." *Ante*, at 610. Those issues are irrelevant to the correct disposition of this case.

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[2] None of the evidence presented by the Government to the District Court places in any serious question the existence of these three elements.

The claim here is not that the Justice Department discriminated among *known* violators of the draft registration law either in its administration of the "beg" policy, which gave such individuals the option of registering to avoid prosecution, or in prosecuting only some reported nonregistrants. Instead, the claim is that the system by which the Department defined the class of possible prosecutees—the "passive" enforcement system—was designed to discriminate against those who had exercised their First Amendment rights. Such governmental action cannot stand if undertaken with discriminatory intent. As this Court has clearly stated, "for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is 'patently unconstitutional.'" *Bordenkircher* v. *Hayes*, 434 U. S. 357, 363 (1978); see also *United States* v. *Goodwin*, 457 U. S. 368, 372 (1982). If the Government intentionally discriminated in defining the pool of potential prosecutees, it cannot immunize itself from liability merely by showing that it used permissible methods in choosing whom to prosecute from this previously tainted pool. Cf. *Connecticut* v. *Teal*, 457 U. S. 440, 450–451 (1982).

Under the Court's flawed approach, there would have been no equal protection violation in *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886), this Court's seminal selective prosecution decision. In *Yick Wo*, the Court reversed a conviction under a municipal ordinance that prohibited the construction of wooden laundries without a license. The Court held that such a conviction could not stand because the municipal licensors had discriminatorily denied licenses to individuals of Chinese origin. If the Court then had focused only on the prosecutions themselves, as it does now, it would have found no discrimination in the choice, among violators of the ordinance, of the individuals to be prosecuted. Indeed, all but one of these violators were of Chinese origin. Instead, the Court properly focused on the official action that led to those prosecutions. In *Yick Wo*, that prior action was the discriminatory denial of licenses, which affected the definition of the class from which prosecutees were chosen. In this case, the referrals made by Selective Service to the Justice Department for investigation and possible prosecution played a similar role and may also have been discriminatory. It is to that issue that the Court should have directed its attention.

I do not suggest that all prosecutions undertaken pursuant to passive enforcement schemes warrant evidentiary hearings on the question of selective prosecution. But where violations of the law are so closely intertwined with political activity, where the speech at issue is so unpalatable to the Government, and where the discriminatory effect is conceded, the need for a hearing is significant and in no way opens the door to an onslaught of such hearings in less compelling contexts.[3]

Here, I believe that Wayte has raised sufficient questions about the Government's intentions to be entitled to obtain access to evidence in the Government's possession. I therefore dissent from the Court's outright dismissal of his equal protection claim.

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[3] In my mind, Wayte's claim that the "passive" enforcement scheme placed a direct burden on First Amendment freedoms, *ante*, at 607–610, should not be addressed at this stage in the litigation. The materials that Wayte sought to discover, and that he well may be entitled to discover, could be relevant to that claim. The Court of Appeals should resolve the issue of access to evidence on remand; the resolution of the merits of Wayte's claims should await a final determination of that issue.

BENNETT, SECRETARY OF EDUCATION *v.* NEW JERSEY

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 83-2064. Argued January 8, 1985—Decided March 19, 1985

In earlier proceedings in this litigation, this Court, reversing the Court of Appeals' judgment, held that the Federal Government may recover misused funds from States that provided assurances that federal grants would be spent only on eligible programs under Title I of the Elementary and Secondary Education Act of 1965, which provided for grants to support compensatory education for disadvantaged children in low-income areas. *Bell* v. *New Jersey*, 461 U. S. 773. However, the Court expressly declined to address the issue whether substantive provisions of the 1978 Amendments to the Act apply retroactively for determining if Title I funds were misused in earlier years. On remand, New Jersey argued that the 1978 Amendments, which relaxed the eligibility requirements for local schools to receive Title I funds, should be applied in determining whether funds were misused during the years 1970–1972. The Court of Appeals agreed and remanded the case to petitioner Secretary of Education to determine whether the disputed expenditures conformed to the 1978 standards.

Held: The substantive standards of the 1978 Amendments do not apply retroactively for determining if Title I funds were misused under previously made grants. Pp. 638–646.

(a) The Court of Appeals' reliance—based on language from *Bradley* v. *Richmond School Board*, 416 U. S. 696—on a presumption that statutory amendments apply retroactively to pending cases is inappropriate in this context. Both the nature of the obligations that arose under the Title I program and *Bradley* itself suggest that changes in substantive requirements for federal grants should not be presumed to operate retroactively. Moreover, practical considerations related to the administration of federal grant programs imply that obligations generally should be determined by reference to the law in effect when the grants were made. Retroactive application of changes in the substantive requirements of a federal grant program would deny both federal auditors and grant recipients fixed, predictable standards to determine if expenditures are proper. Pp. 638–641.

(b) Neither the statutory language nor the legislative history indicates that Congress intended the substantive standards of the 1978

Amendments to apply retroactively. Both the general purpose of the 1978 Amendments to clarify and simplify provisions concerning implementation of Title I, and specific references in the statute and legislative history suggest that the new requirements were intended to apply prospectively. Nor do changes in the Act and administrative regulations, made since 1976, support the Court of Appeals' conclusion that earlier regulations were inconsistent with Title I's policies. Pp. 641–645.

(c) There is no inequity here in requiring repayment of funds that were spent contrary to the assurances provided by the State in obtaining the federal grants. Moreover, the role of a court in reviewing a determination by the Secretary of Education that funds have been misused is to judge whether the findings are supported by substantial evidence and reflect application of the proper legal standards. Where the Secretary has properly concluded that funds were misused under the legal standards in effect when the grants were made, a reviewing court has no independent authority to excuse repayment based on its view of what would be the most equitable outcome. Pp. 645–646.

724 F. 2d 34, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, BLACKMUN, and REHNQUIST, JJ., joined. STEVENS, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 646. POWELL, J., took no part in the consideration or decision of the case.

Michael W. McConnell argued the cause for petitioner. With him on the briefs were *Solicitor General Lee* and *Deputy Solicitor General Geller*.

Mary Ann Burgess, Assistant Attorney General of New Jersey, argued the cause for respondent. With her on the brief were *Irwin I. Kimmelman*, Attorney General, *Michael R. Cole*, First Assistant Attorney General, and *Regina A. Murray* and *Michael J. Haas*, Deputy Attorneys General.*

JUSTICE O'CONNOR delivered the opinion of the Court.

The issue presented is whether substantive provisions of the 1978 Amendments to Title I of the Elementary and Secondary Education Act apply retroactively for determining if Title I funds were misused during the years 1970–1972. This case was previously before the Court, and we then held that the Federal Government may recover misused funds from States that provided assurances that federal grants would be spent only on eligible programs. *Bell* v. *New Jersey*, 461 U. S. 773 (1983). We expressly declined, however, to address the retroactive effect of substantive provisions of the 1978 Amendments. *Id.*, at 781, n. 6, 782, and n. 7. On remand from our decision, the Court of Appeals for the Third Circuit held that the standards of the 1978 Amendments should apply to determine if funds were improperly expended in previous years. *State of New Jersey, Dept. of Ed.* v. *Hufstedler*, 724 F. 2d 34 (1983). We granted certiorari, 469 U. S. 815 (1984), and we now reverse.

**Fred N. Fishman, Robert H. Kapp, Norman Redlich, William L. Robinson,* and *Norman J. Chachkin* filed a brief for the Lawyers' Committee for Civil Rights Under Law as *amicus curiae* urging reversal.

I

Title I of the Elementary and Secondary Education Act of 1965, Pub. L. 89–10, 79 Stat. 27, as amended, 20 U. S. C. §241a *et seq.* (1976 ed.), provided federal grants-in-aid to support compensatory education for disadvantaged children in low-income areas.[1] Based on the theory that poverty and low scholastic achievement are closely related, Title I allocated funds to local school districts based on their numbers of impoverished children and the State's average per-pupil expenditures. H. R. Rep. No. 95–1137, pp. 4, 8 (1978); S. Rep. No. 95–856, p. 5 (1978); see 20 U. S. C. §§241a, 241c(a)(2) (1976 ed.); S. Rep. No. 146, 89th Cong., 1st Sess., 5–6 (1965). Within particular school districts, Title I funds were in turn directed to schools that had high concentrations of children from low-income families. § 241e(a)(1)(A). Once Title I funds reached the level of targeted schools, however, all children in those schools who needed compensatory education services were eligible for the program regardless of family income. H. R. Rep. No. 95–1137, at 4; 45 CFR § 116a.21(e) (1977); 45 CFR § 116.17(f) (1972). Respecting the deeply rooted tradition of state and local control over education, Congress left to local officials the development of particular programs to meet the needs of educationally disadvantaged children. Federal restrictions on the use of funds at the local level sought only to assure that Title I moneys were properly used "to provide specific types of children in specific areas with special services above and beyond those normally provided as part of the district's regular educational program." H. R. Rep. No. 95–1137, at 4.

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[1] The Education Amendments of 1978, Pub. L. 95–561, 92 Stat. 2143, 20 U. S. C. §2701 *et seq.*, reauthorized the Title I program and generally amended the Elementary and Secondary Education Act. The Title I program was subsequently succeeded by Chapter 1 of the Education Consolidation and Improvement Act of 1981, Pub. L. 97–35, 95 Stat. 464, 20 U. S. C. §3801 *et seq.* Chapter 1 retains Title I's focus upon assisting educationally deprived children who live in low-income areas.

The goal of providing assistance for compensatory programs for certain disadvantaged children while respecting the tradition of state and local control over education was implemented by statutory provisions that governed the distribution of Title I funds. Local school districts determined the content of particular programs, and the appropriate state education agency approved the applications for Title I assistance submitted by local education agencies. 20 U. S. C. § 241e(a) (1976 ed.). After determining that the applications complied with the requirements of federal law, the state education agencies distributed Title I funds to the school districts. §§ 241e(a), 241g. The state education agencies in turn received grants from the Department of Education upon providing assurances to the Secretary that the local educational agencies would spend the funds only on programs which satisfied the requirements of Title I.[2] *Bell* v. *New*

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[2] In 1980, the Department of Education replaced the former Office of Education as the federal agency responsible for administering Title I. See *Bell* v. *New Jersey*, 461 U. S. 773, 776, n. 1 (1983). For simplicity, unless the distinction is significant, we will refer to both the Office of Education and the Department of Education as the Department and to both the

Jersey, *supra*, at 776; 20 U. S. C. § 241f(a)(1) (1976 ed.). As noted *supra*, we previously held that if Title I funds were expended in violation of the provided assurances, the Federal Government may recover the misused funds from the States.

This case arises from a determination by the Department of Education that respondent New Jersey must repay $1,031,304 in Title I funds that were improperly spent during the years 1970–1972 in Newark, N. J. 461 U. S., at 777. There is no contention that the Newark School District received an incorrect allocation of Title I funds or that funds were not used for compensatory education programs. Instead, the Secretary's demand for repayment rests on the finding that Title I funds were not directed to the proper schools within the Newark School District. Regulations in effect when the moneys were expended provided that school attendance areas within a school district could receive Title I funds if either the percentage or number of children from low-income families residing in the area was at least as high as the districtwide average. 45 CFR § 116.17(d) (1972). Alternatively, the entire school district could be designated as eligible for Title I services, but only if there were no wide variances in the concentrations of children from low-income families among school attendance areas in the district. *Ibid.* A federal audit completed in 1975 determined that the New Jersey Department of Education had incorrectly approved grant applications allowing 13 Newark schools to receive Title I funds in violation of these requirements. App. 9–51.

The auditors found that during the 1971–1972 school year, the percentage of children from low-income families for the 13 schools ranged from 13% to 33.5%, while the districtwide average for Newark was 33.9%. *Id.*, at 23–24. Consequently, for that school year the auditors disallowed Title I expenditures totaling $1,029,630. The auditors also found that funds were misused during the 1970–1971 school year,

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former Commissioner of Education and the Secretary of Education as the Secretary. See *ibid.*

but because of the statute of limitations, only $1,674 remains at issue for that year. App. to Pet. for Cert. 36a–37a. In June 1976, the Department issued a final determination letter to New Jersey demanding repayment of the misused funds. App. 52–58. New Jersey sought further administrative review, and hearings were held before the Education Appeal Board (Board). In those proceedings, New Jersey argued that the Department was not authorized to compel repayment, that the auditors had miscalculated the percentages of children from low-income families, and that the entire Newark School District qualified as a Title I project area under the regulations. App. to Pet. for Cert. 35a–58a. The Board rejected each of these arguments, *id.*, at 37a–58a, and ordered repayment. The Secretary declined to review the Board's order, which thereby became final. *Id.*, at 59a.

New Jersey then sought judicial review, and the Court of Appeals for the Third Circuit held that the Department did not have authority to issue the order demanding repayment. *State of New Jersey, Dept. of Ed.* v. *Hufstedler*, 662 F. 2d 208 (1981). Accordingly, the Court of Appeals did not address arguments made by New Jersey challenging the Department's determination that funds were misused. *Id.*, at 209. After remand from our decision in *Bell* v. *New Jersey*, the State argued for the first time that the 1978 Amendments to Title I, Pub. L. 95–561, 92 Stat. 2143, 20 U. S. C. §2701 *et seq.*, should determine whether the funds were misused during the years 1970–1972. 724 F. 2d, at 36, n. 1. The Court of Appeals agreed and remanded the case to the Secretary to determine whether the disputed expenditures conformed to the 1978 standards. *Id.*, at 37. We hold that the substantive standards of the 1978 Amendments do not affect obligations under previously made grants, and we reverse. Our holding does not address whether the Secretary correctly determined that Title I funds were misused under the law in effect during the years 1970–1972, and New Jersey may renew its contentions in this regard on remand.

II

The Court of Appeals based its holding on a presumption that statutory amendments apply retroactively to pending cases. Relying on language from *Bradley* v. *Richmond School Board*, 416 U. S. 696 (1974), the Court of Appeals observed that "[a] federal court or administrative agency must 'apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary.'" 724 F. 2d, at 36, quoting 416 U. S., at 711. We conclude, however, that reliance on such a presumption in this context is inappropriate. Both the nature of the obligations that arose under the Title I program and *Bradley* itself suggest that changes in substantive requirements for federal grants should not be presumed to operate retroactively. Moreover, practical considerations related to the administration of federal grant programs imply that obligations generally should be determined by reference to the law in effect when the grants were made.[3]

As we explained in our first decision in this case, "the pre-1978 version [of Title I] contemplated that States misusing federal funds would incur a debt to the Federal Government for the amount misused." 461 U. S., at 782. Although our conclusion was based on the statutory provisions, *id.*, at 782–790, we also acknowledged that Title I, like many other federal grant programs, was "much in the nature of a contract." *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1, 17 (1981). "The State chose to participate in the Title I program and, as a condition of receiving the grant, freely gave its assurances that it would abide by the conditions of Title I." 461 U. S., at 790. A State that failed to fulfill its assurances has no right to retain the federal funds, and the Federal Government is entitled to recover amounts spent contrary to terms of the grant agreement. *Id.*, at 791; see *id.*, at 794 (WHITE, J., concurring). In order to obtain the Title I funds involved here, New Jersey gave assurances that the money would be distributed to local education agencies for programs that qualified under the existing statute and regulations. See 20 U. S. C. § 241f(a) (1976 ed.); 45 CFR § 116.31(c) (1972). Assuming that these assurances were not met for the years 1970–1972, see 461 U. S., at 791, the State became liable for the improper expenditures; as a correlative, the Federal Government had, before the 1978 Amendments, a pre-existing right of recovery. *Id.*, at 782, and n. 7.

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[3] In determining compliance with federal grant programs, other Courts of Appeals have consistently applied the legal requirements in effect when the grants were made. See, *e. g.*, *Indiana* v. *Bell*, 728 F. 2d 938, 941, n. 6 (CA7 1984); *North Carolina Comm'n of Indian Affairs* v. *Department of Labor*, 725 F. 2d 238, 239 (CA4 1984); *Woods* v. *United States*, 724 F. 2d 1444, 1446 (CA9 1984); *West Virginia* v. *Secretary of Education*, 667 F. 2d 417, 420 (CA4 1981).

The fact that the Government's right to recover any misused funds preceded the 1978 Amendments indicates that the presumption announced in *Bradley* does not apply here. *Bradley* held that a statutory provision for attorney's fees applied retroactively to a fee request that was pending when the statute was enacted. This holding rested on the general principle that a court must apply the law in effect at the time of its decision, see *United States* v. *Schooner Peggy*, 1 Cranch 103 (1801), which *Bradley* concluded holds true even if the intervening law does not expressly state that it applies to pending cases. 416 U. S., at 715. *Bradley*, however, expressly acknowledged limits to this principle. "The Court has refused to apply an intervening change to a pending action where it has concluded that to do so would infringe upon or deprive a person of a right that had matured or become unconditional." *Id.*, at 720. This limitation comports with another venerable rule of statutory interpretation, *i. e.*, that statutes affecting substantive rights and liabilities are presumed to have only prospective effect. See, *e. g.*, *United States* v. *Security Industrial Bank*, 459 U. S. 70, 79

(1982); *Greene* v. *United States*, 376 U. S. 149, 160 (1964). Cf. *Bradley*, *supra*, at 721 (noting that statutory change did not affect substantive obligations).

Practical considerations related to the enforcement of the requirements of grant-in-aid programs also suggest that expenditures must presumptively be evaluated by the law in effect when the grants were made. The federal auditors who completed their review of the disputed expenditures in 1975 could scarcely base their findings on the substantive standards adopted in the 1978 Amendments.[4] Similarly, New Jersey when it applied for and received Title I funds for the years 1970–1972 had no basis to believe that the propriety of the expenditures would be judged by any standards other than the ones in effect at the time. Cf. *Pennhurst State School and Hospital*, *supra*, at 17, 24–25. Retroactive application of changes in the substantive requirements of a federal grant program would deny both federal auditors and grant recipients fixed, predictable standards for determining if expenditures are proper.

Requiring audits to be redetermined in response to every statutory change that occurs while review is pending would be unworkable and would unfairly make obligations depend on the fortuitous timing of completion of the review process. Moreover, the practical difficulties associated with retroactive application of substantive provisions in the 1978 Amendments would be particularly objectionable, because Congress expressly intended those Amendments to strengthen the auditing process by clarifying the Department's responsibilities and specifying the procedures to be followed. See *Bell* v. *New Jersey*, 461 U. S., at 789; S. Rep. No. 95–856, at 37, 131; H. R. Rep. No. 95–1137, at 53, 161. We conclude that absent a clear indication to the contrary in the relevant statutes or legislative history, changes in the substantive standards governing federal grant programs do not alter obligations and liabilities arising under earlier grants.

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[4] The eligibility requirements for school attendance areas have been altered many times since the years 1970–1972. Changes were made by 1974 Amendments to Title I, and the requirements were modified by regulation in 1976 and again amended in 1978. *Infra*, at 643, and n. 6. The Department issued regulations in 1981 clarifying the requirements of the 1978 Amendments. 34 CFR § 201.51(d)(ii) (1981). Later in 1981, the enactment of Chapter 1, see n. 1, *supra*, superseded the provisions of Title I. Chapter 1 has its own provisions governing eligibility for attendance areas within school districts, see 20 U. S. C. § 3805(b), and these provisions were amended in 1983. See Pub. L. 98–211, § 3, 97 Stat. 1413, 20 U. S. C. § 3805(d) (1982 ed., Supp. I).

III

Neither the statutory language nor the legislative history indicates that Congress intended the substantive standards of the 1978 Amendments to apply retroactively. Congress adopted the amendments as part of a general reauthorization of Title I that did not depart from the program's basic philosophy, but instead sought to clarify and simplify provisions concerning implementation. H. R. Rep. No. 95–1137, at 2, 8; S. Rep. No. 95–586, at 2, 8, 130. The substantive provisions of the 1978 Amendments to Title I were expressly made applicable for grants between October 1, 1978, and September 30, 1983. 20 U. S. C. § 2702. See also Pub. L. 95–561, § 1530, 92 Stat. 2380 (provisions shall take effect on October 1, 1978, "[e]xcept as otherwise specifically provided in this Act"). The House Report similarly stated that the changed requirements were intended to clarify "the manner in which school districts *are to distribute* Title I funds among eligible schools and children." H. R. Rep. No. 95–1137, at 21 (emphasis added). Thus, both the general purpose of the 1978 Amendments and the more specific references in the statute and legislative history suggest that the new requirements were intended to apply prospectively.

The Court of Appeals did not rely on evidence from the legislative history to conclude that the 1978 Amendments in general have retroactive effect. Instead, the court below observed that the amendments to the school attendance area eligibility requirements "were designed to correct regulations that frustrated the basic objectives of the Title I program." 724 F. 2d, at 36–37. This observation mischaracterizes both the regulations in effect prior to 1976 and the provisions adopted by Congress in 1978. Regulations adopted in 1967, see 32 Fed. Reg. 2742, and in effect for nearly 10 years, generally restricted Title I assistance to school attendance areas having a percentage of low-income children at least as high as the districtwide average. *Supra*, at 636; see also Office of Education, Title I Program Guide No. 44, ¶1.1 (1968) (explaining eligibility requirements). This requirement deliberately channeled funds to the poorest areas within any particular school district. One consequence of this comparative approach, however, was that a school located in a disadvantaged district might be ineligible for assistance even though it would have qualified if it were located in a wealthier district.[5] Although later changes in the eligibility standards attempted to mitigate this incidental effect, they do not indicate that the earlier regulations conflicted with the policies of Title I.

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[5] Of course, relatively poor school districts would receive a greater districtwide allocation of Title I funds because this amount was determined by the number of poor children within the district. This fact is illustrated by the present case: for the period from September 1, 1970, to August 31, 1973, Newark was allocated more than $28 million in Title I funds, or 18.4% of New Jersey's total allocation. App. 14.

Moreover, from the outset of the Title I program, the regulations provided that in certain circumstances an entire school district could qualify as a Title I project. 45 CFR § 116.17(b) (1966). This alternative responded to indications by Congress that districtwide eligibility might be appropriate for particularly impoverished areas. See S. Rep. No. 146, 89th Cong., 1st Sess., 9 (1965) ("There may be circumstances where a whole school system is basically a low-income area and the best approach in meeting the needs of educationally deprived children would be to upgrade the regular program"); H. R. Rep. No. 1814, 89th Cong., 2d Sess., 3 (1966) ("[W]hen 30 or 40 percent of the children in the school district are from low-income families, all of the children in the district could be considered disadvantaged and the whole school system could be upgraded").

We do not address whether the Secretary correctly determined that Newark did not qualify for districtwide eligibility under the legal provisions in effect during the years 1970–1972. See *supra*, at 637.

During consideration of 1974 Amendments to Title I, a House Committee observed that inflexible application of the existing regulations might make schools with high proportions of low-income children ineligible. H. R. Rep. No. 93–805, p. 17 (1974) ("[I]t was never intended by the Act to render any school with a 30% concentration ineligible"). Although the 1974 Amendments made changes in the school eligibility requirements, they did not specifically address this situation.[6] Apparently prompted by the concerns of Congress, the Department modified its regulations in 1976 to permit a school attendance area to qualify for funds if more than 30% of its children were from low-income families, even though the districtwide average might exceed 30%. See 42 Fed. Reg. 42914, 42917 (1976), codified in 45 CFR § 116a.20 (b)(2) (1977); National Institute of Education, Title I Funds Allocation: The Current Formula 57, 109 (1977). The 1978 Amendments refined this alternative by lowering the percentage to 25% and requiring the school district to guarantee that state and federal funding for compensatory education would not be reduced for any other school attendance area that received Title I funds in the preceding year. 20 U. S. C. § 2732(a)(1).

The evolution of the school eligibility requirements no doubt reflects a reassessment of the proper means to implement the goals of Title I. Nonetheless, the changes made since 1976 simply do not support the conclusion of the Court of Appeals and the contention of New Jersey that the earlier regulations were inconsistent with Title I's policies. The regulations in place from 1967 to 1976 targeted assistance to the neediest areas within each school district in conformance with the statutory directive that funds should go to school attendance areas having high concentrations of children from low-income families. See 20 U. S. C. § 241e(a) (1976 ed.). Moreover, available funds never were sufficient to provide services to all eligible students, H. R. Rep. No. 95–1137, at 7, and Title I required funds to be concentrated on particular projects rather than diffused among all eligible school attendance areas. See 20 U. S. C. § 241e(a)(1)(B) (1976 ed.); 45 CFR § 116.17(c) (1972). Thus, the school eligibility requirements helped to assure that funds would not be spread so thinly as to impair the effectiveness of particular Title I projects. Cf. H. R. Rep. No. 1814, 89th Cong., 2d Sess., 3 (1966) (suggesting that limited funds should be directed to schools with highest concentrations of children from low-income families); S. Rep. No. 95–856, at 7 ("[T]itle I is successful in directing substantial federal aid to those areas which have the highest proportions of children from low-income families").

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[6] The 1974 Amendments liberalized the eligibility standards by providing that an otherwise ineligible school attendance area would be deemed eligible if it had qualified and received Title I funds in either of the two preceding fiscal years. Pub. L. 93–380, § 101(a)(5)(D), 88 Stat. 500, 20 U. S. C. § 241e(a)(13) (1976 ed.). Furthermore, the 1974 Amendments allowed a local education agency to deem a school attendance area eligible for Title I assistance based on the actual attendance, rather than the residency, of children from low-income families. § 101(a)(5)(B), 88 Stat. 500, 20 U. S. C. § 241e(a)(1)(A) (1976 ed.). See S. Rep. No. 93–763, p. 30 (1974); H. R. Rep. No. 93–805, pp. 16–17 (1974); S. Conf. Rep. No. 93–1026, p. 144 (1974).

Congress did not abandon the concerns underlying the earlier regulations when it enacted the 1978 Amendments. Legislative Reports spoke approvingly of the longstanding policy to direct funds to school attendance areas "having the highest concentrations of low-income families." *Id.*, at 11; H. R. Rep. No. 95–1137, at 21. Although the 1978 Amendments relaxed the eligibility requirements for school attendance areas, the intent was "to give districts more flexibility without watering down the targeting features intended to give the programs a focus when funds are limited." *Ibid.* The 25% eligibility standard was itself the product of a compromise at Conference. The House bill, see *id.*, at 22, 211, but not the Senate amendment, provided that any school attendance area having a 20% concentration of poor children must be designated as eligible for Title I. H. R. Conf. Rep. No. 95–1753, p. 255 (1978). The Conference agreed to an amendment that made the designation of these areas optional, increased the required percentage to 25%, and provided that other areas must retain the same amount of funds they received the preceding year. *Ibid.* Although it is fair to infer that Congress determined that the targeting features of Title I would not be unduly compromised by adoption of the 25% standard, the background to the 1978 Amendments does not suggest the earlier regulations frustrated the program or that Congress intended the Amendments to apply to prior grants.

IV

New Jersey urges that we affirm the holding below on the ground that the Court of Appeals reached an equitable result. The determination by the Secretary does not question the good faith of New Jersey or the Newark School District with respect to the disputed expenditures, which we acknowledge might be permissible under standards enacted in 1978 or currently in effect.[7] Nonetheless, we find no inequity in requiring repayment of funds that were spent contrary to the assurances provided by the State in obtaining the grants. Particular cases might appear to present exceptions to this rule, but given the statutory and administrative framework for assuring compliance with the requirements of Title I, we do not think recognizing such exceptions is within the province of the courts. Congress has already accommodated equitable concerns in the statutory provisions governing recovery of misused funds. Those provisions limit liability for repayment to funds received during the five years preceding the final written notice of liability, 20 U. S. C. § 884 (1976 ed.), repealed and replaced by 20 U. S. C. § 1234a(g), and authorize the Secretary, under certain conditions, to return to the State up to 75% of any amount recovered. § 1234e(a). Of course, if Congress believes that the equities so warrant, it may relax the requirements applicable to prior grants or forgive liability entirely. The role of a court in reviewing a determination by the Secretary that funds have been misused is to judge whether the findings are supported by substantial evidence and reflect application of the proper legal standards. *Bell* v. *New Jersey*, 461 U. S., at 792. Where the Secretary has properly concluded that funds were misused under the legal standards in effect when the grants were made, a reviewing court has no independent authority to excuse repayment based on its view of what would be the most equitable outcome. Cf. *Bennett* v. *Kentucky Dept. of Education*, *post*, at 662–663.

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[7] New Jersey contends that 10 of the disputed attendance areas had concentrations of low-income children exceeding 25%, and under the 1978 standards, the State is liable for a minimum of $249,607. As the Court of Appeals noted, 724 F. 2d, at 37, the 1978 standards would not be satisfied if compensatory funding was not maintained at prior-year levels in other schools receiving Title I aid. *Ibid.* The present record leaves unclear whether this requirement was satisfied, *ibid.*, and the possibility that the necessary information is no longer available merely underscores the practical problems resulting from retroactive application of changes in the eligibility requirements. Brief for Petitioner 46, and n. 37.

Because the Court of Appeals has not yet addressed New Jersey's arguments that the demanded repayment does not reflect proper application of the standards in effect during 1970–1972, the State may renew these contentions on remand. Accordingly, the decision of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE POWELL took no part in the consideration or decision of this case.

JUSTICE STEVENS, with whom JUSTICE MARSHALL joins, dissenting.

The Elementary and Secondary Education Act of 1965, 79 Stat. 27, was a part of the broader program that President

Johnson characterized as the "war on poverty."[1] Title I of the Act authorized the expenditure of large sums of federal money to improve the education of children in low-income areas. The statute, however, did not contain a specific definition of the schools that would qualify for assistance under the program. It merely stated that "payments under this subchapter will be used for programs and projects . . . (A) which are designed to meet the special educational needs of educationally deprived children in school attendance areas having high concentrations of children from low-income families. . . ." 20 U. S. C. § 241e(a)(1) (1976 ed.).

As the case comes to us, the underlying issue is whether 10 of the public schools in Newark, New Jersey,[2] that received federal assistance in the 1971–1972 school year were located "in school attendance areas having high concentrations of children from low-income families" within the meaning of the Act as it was enacted and as it was clarified by subsequent amendments. If funds were incorrectly allocated to those schools, the total federal grant was not increased; instead, the consequence was a lower distribution to other Newark schools that admittedly qualified for federal aid.[3] There is no dispute about the fact that the money that was allocated to these schools—like that allotted to over 60 other schools in Newark—was used in programs and projects properly designed to meet the special educational needs of educationally deprived children.[4] The only "misuse" of federal funds that is at issue is the suggestion that the money should have been spent in different school-attendance areas. The remedy for this misuse is not a redistribution to the more needy areas, but is a recapture of the funds by the Federal Government.

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[1] Cf. S. Rep. No. 146, 89th Cong., 1st Sess., 4 (1965) ("'Poverty will no longer be a bar to learning, and learning shall offer an escape from poverty. We will neither dissipate the skills of our people, nor deny them the fullness of a life informed by knowledge. And we will liberate each young mind—in every part of this land—to reach the furthest limits of thought and imagination'") (statement of President Johnson).

[2] The original dispute between the parties involved 10 elementary schools and 3 high schools. If the Court of Appeals' disposition were accepted, the determination of ineligibility for two elementary schools and for one high school would no longer be at issue. See *State of New Jersey, Dept. of Education* v. *Hufstedler*, 724 F. 2d 34 (CA3 1983); Brief for Respondent 15–16, n. 12 (acknowledging that, under the Third Circuit's decision, it would have to repay "to the Secretary a minimum of $249,607"); *id.*, at 16–17, n. 13.

[3] The Title I funds allotted to the New Jersey State Department of Education for the 3-year period between September 1, 1970, and August 31, 1973, aggregated $156,166,574. Of this total, $28,709,198 was suballotted to the Newark School District. There was no question about the total

The Court agrees that the areas in dispute would have qualified for federal assistance under the statute as amended in 1978, and under the Secretary's regulations that are now in effect. *Ante*, at 645. I think the Court would also agree that the Secretary had authority under the original Act to issue the regulations that are in effect today; indeed, in 1976 the Secretary did issue regulations that would have qualified seven of the attendance areas that are now in dispute.[5] As the case comes to us it is also clear that we must assume that none of the disputed areas qualified under the Secretary's regulations that were in effect in 1971–1972.[6] Thus, the

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amount of money that either New Jersey or Newark was entitled to receive. The only question at issue in this case is whether Newark distributed some of that money to the wrong schools. *Ante*, at 636; Brief for Petitioner 4, n. 1 ("[T]he Newark school district received its correct allocation of Title I funds"); Brief for Respondent 5; App. 14.

[4] Brief for Petitioner 9 ("[T]he principal issue in the audit was the method of calculating eligibility of school attendance areas in 1971–1972").

[5] The "low-income percentage" as determined by the federal auditors for the 10 disputed school-attendance areas ranged from a low of 27.9% to a high of 33.5%. In seven of these areas the figure was in excess of 30%. The auditors also disqualified two elementary-school-attendance areas with percentages of 22.9% and 20.6% and one high-school-attendance area with a percentage of 13%. App. 23–24. The determinations for those three areas would apparently no longer be in dispute if the Court of Appeals' decision were affirmed. See Brief for Respondent 15–16, n. 12, 16–17, n. 13. See also n. 3, *supra*.

[6] New Jersey argued that, if the children who were not attending school and those who were attending special schools in the area were counted, the

question for decision is whether the legal standard that should govern the disposition of this controversy is to be derived from the Secretary's regulations in effect during the 1971–1972 school year—which admittedly were violated—or from the statutory language, which plainly was broad enough to authorize these expenditures when the statute was first enacted in 1965 as well as after its amendment in 1978.

The Court holds that the now repudiated regulations must be strictly enforced. I agree with the Court's view that the fact that its holding produces an inequitable outcome does not authorize a reviewing court to depart from the controlling legal standard,[7] but I am convinced that the Court has seriously misread the intent of Congress.

I

In order to understand the impact of the regulations that must be strictly enforced under the Court's holding—and which I submit Congress later repudiated—it is useful to set forth the relevant facts concerning one of the school-attendance areas where federal money was allegedly "misused." The federal auditors disallowed expenditures of $104,842 for special programs at Newark's South 17th Street Elementary School. The disallowance was based on a determination that only 33.5% of the 1,549 children in the school were from low-income families.[8] Because the average percentage of children from low-income families in the entire

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correct percentage of the low-income children in most of the attendance areas would be increased. Thus, for example, in the attendance area of the South 17th Street Elementary School, the low-income percentage would be 40.3%. See App. to Pet. for Cert. 53a; for purposes of decision, I assume that argument was correctly rejected by the auditors. However, I note that New Jersey has represented that the poverty level in the attendance area of the South 17th Street Elementary School had risen to 73.91% in 1984–1985. See Brief for Respondent 8, n. 5.

[7] *Ante*, at 646; cf. *Trans World Airlines, Inc.* v. *Franklin Mint Corp.*, 466 U. S. 243, 277 (1984) (STEVENS, J., dissenting).

[8] App. 23, 25.

Newark School District was slightly higher—33.9%—the South 17th Street Elementary School did not satisfy one of the eligibility criteria in the Secretary's regulations.[9] Under those regulations, unless the entire Newark School District qualified for assistance, only those school-attendance areas in which the percentage exceeded the districtwide average could qualify. Thus, even though South 17th Street's percentage of 33.5 would have qualified for federal aid in any other school district in New Jersey and, indeed, in almost any school district in the entire United States,[10] it did not meet the Secretary's rigid standard.

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[9] Title 45 CFR § 116.17(d) (1972) then provided:

"A school attendance area for either a public elementary or a public secondary school may be designated as a project area if the estimated percentage of children from low-income families residing in that attendance area is as high as the percentage of such children residing in the whole of the school district, or if the estimated number of children from low-income families residing in that attendance area is as large as the average number of such children residing in the several school attendance areas in the school district. In certain cases, the whole of a school district may be regarded as an area having a high concentration of such children and be approved as a project area, but only if there are no wide variances in the concentrations of such children among the several school attendance areas in the school district."

[10] It is undisputed that Newark's poverty level was one of the highest in the Nation. New Jersey offers the following description:

"The Newark School District for the years 1970 through 1973, the period covered by the federal audit before this Court, could readily be characterized as the prototypic Title I district. The application for Title I funds for the year 1971–72 school year, the primary focus of the audit, showed that 33.9% of the children in the Newark School District were from low-income families (J. A. 108). The narrative portion of this application clearly demonstrated that Newark was uniformly disadvantaged in other ways. Statistics showed a jobless rate in 1970 of 14%; a rate which was double that needed to qualify under the Economic Development Act. Another 35,000 residents were earning $3,000 per year or less. In 1971, the Model Cities program in Newark was expanded to include the entire city. At the time the 1971–72 application was submitted, Newark had a black population of 54.2% with another 11% of its population of hispanic background. The City also had the highest percentage of slum housing in the nation, the

When the anomalous consequences of this regulation came to the attention of Congress during its consideration of amendments to the Act in 1974, the House Committee on Labor and Education issued a Report that expressed the opinion that "it was never intended by the Act to render any school with a 30% concentration ineligible."[11] Presumably it was that Report that prompted the Secretary to modify the regulations in 1976 to permit school-attendance areas with more than 30% of the children from low-income families to qualify even though the districtwide percentage was even higher.[12] Regardless of whether that is a correct explanation

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highest incidence of crime per 10,000 population, the highest population density, a high rate of maternal mortality and the second highest birth rate. Of particular significance to the Title I program, and exacerbating the inherent difficulties of obtaining precise statistics for Newark's low-income population, was the fact that in 1970–71 Newark had the highest population turnover in the nation. Indeed, Model Cities data indicated that mobility rates reached as high as 80% for schools in the Title I area (J. A. 113 to J. A. 114; J. A. 69)." Brief for Respondent 3–4 (footnote omitted).

[11] The quoted statement appears in the following paragraph from H. R. Rep. No. 93–805, p. 17 (1974):

"As originally conceived and as extended, Title I authority is basically centered in the local educational agency (the school district). The special needs of the educationally disadvantaged child and programs to meet those needs must be locally devised. This is consistent with the Congress' historical concern that local communities should, not in conflict with constitutional and legal prescriptions, formulate educational policy. . . . This is not consistent with strict Federal administration regulations which so narrowly define 'target school' that a school in one local educational agency with 10% of its enrollment of 'educationally deprived' is an eligible 'target school,' whereas a school in another local educational agency with 30% or more is not eligible as a target school. While it is clearly the expressed objective to serve children in schools with high concentrations, it was never intended by the Act to render any school with a 30% concentration ineligible."

[12] See 45 CFR § 116a.20(b)(2) (1977), which stated, in pertinent part:

"An attendance area may be designated under paragraph (b)(1) on a percentage basis if the percentage of children from low-income families in that attendance area is at least as high as the percentage of such children of the regulatory change in 1976, it is significant that the Secretary then interpreted the 1965 Act as allowing a school in a 30% area to qualify even though its attendance area had a lower percentage than the districtwide average.

In its consideration of the 1978 Amendments, Congress plainly expressed its disapproval of the kind of interpretation of the 1965 Act that is reflected in the regulations involved in this case. One example, described in the hearings before the Subcommittee on Elementary, Secondary and Vocational Education, provides a precise analogue to this case:

> "In Baltimore City any school district which has less than 30.3% Title I children was not eligible to receive Title I funds. This minimum is higher than the maximum incidence in schools receiving Title I funds in 11 other counties. This means there are schools in relatively affluent counties receiving Title I assistance with no more than 5% Title I children while schools in Baltimore City with 25–30% Title I children are excluded from the program." [13]

In response to testimony of that kind, Congress amended the statute to make it clear that a local school district could designate any attendance area with a 25% incidence of poverty as eligible for Title I funds. The House Report explained the purpose of the change (which originally proposed a reduction to 20%):

> "[C]urrent OE regulations [45 CFR § 116a–20(b)(2)] provide that any school attendance area with 30 percent

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residing in the whole of the school district. In addition, upon specific request by the local educational agency, the State educational agency may approve the designation of attendance areas in which at least 30 percent of the children are from low-income families."

[13] Education Amendments of 1977: Hearings on H. R. 15 before the Subcommittee on Elementary, Secondary and Vocational Education of the House Committee on Education and Labor, 95th Cong., 1st Sess., pt. 12, p. 392 (1978) (testimony of Ruth Mancuso, vice president of the National Association of State Boards of Education).

> or more children from low-income families (based on eligibility for free lunch) may be designated a target area. . . . The Committee bill reduces this minimum to 20 percent out of a concern that inflexible targeting requirement could force some school districts with very high incidences of poverty to declare school[s] with 20 percent low-income enrollment ineligible, while schools with only 10 percent low-income enrollment or less might be eligible in wealthier neighboring districts."[14]

When Congress amended the Act in 1978 to provide that any school-attendance area would be eligible for federal assistance if at least 25% of its children were from low-income families, it did not change the basic eligibility standard that had been adopted in 1965. Thus, the statute as amended in 1978, like the statute prior to those Amendments, provides that a "local educational agency shall use funds received under this subchapter in school attendance areas having high concentrations of children from low-income families (hereinafter referred to as 'eligible school attendance areas')." 92 Stat. 2161, 20 U. S. C. § 2732(a)(1). In adding the specific provision that a local educational agency may designate any school-attendance area in which at least 25% of the children are from low-income families, Congress did not broaden that standard, but merely ensured that the Secretary would not improperly narrow it. Thus, the only practical effect of the 1978 Amendments was to deny the Secretary the legal authority to promulgate the kind of rigid regulation that is being strictly enforced today.

II

In my opinion this is plainly a case for application of the normal rule that a reviewing court must apply the law in effect at the time of its decision. As JUSTICE WHITE correctly noted when this litigation was before the Court two Terms ago:

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[14] H. R. Rep. No. 95–1137, p. 22 (1978).

> "A federal court or administrative agency must 'apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary.' *Bradley* v. *Richmond School Board*, 416 U. S. 696, 711 (1974). Accord, *Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U. S. 473, 486, n. 16 (1981). Here, nothing in the 1978 Amendments or the legislative history suggests that the Amendments were not intended to be applied retroactively, and their application to this case would not result in manifest injustice." *Bell* v. *New Jersey*, 461 U. S. 773, 793–794 (1983).

In my view, it is the Court's holding, rather than an application of the 1978 Amendments to this case, that results in manifest injustice.

Ever since the statute was enacted in 1965 Congress has expressed a strong preference for allowing broad discretion to local governmental units in the administration of these federally funded programs.[15] We should therefore adopt a strong presumption supportive of a local school board's decision concerning the proper allocation of money among different school-attendance areas subject to its jurisdiction.[16] Finally, it is appropriate to note that, just as the 1978 Amendments themselves protected local school districts from overly prescriptive federal regulations, Congress in 1981 again identified the same interest in further amendatory legislation. Thus, the Education Consolidation and Improvement Act in 1981 directed that federal assistance be provided "in a manner which will eliminate burdensome, unnecessary and unproductive paperwork and free the schools of unnecessary federal supervision, direction and control," 95 Stat. 464, and specifically indicated that federal assistance of the kind involved in this case would be most effective "if educational officials, principals, teachers, and supporting personnel are freed from overly prescriptive regulations and administrative burdens which are not necessary for fiscal accountability and make no contribution to the instructional program." *Ibid.*[17]

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[15] See, *e. g.*, S. Rep. No. 146, 89th Cong., 1st Sess., 9 (1965), which stated:

"It is the intention of the proposed legislation not to prescribe the specific type of programs or projects that will be required in school districts. Rather such matters are left to the discretion and judgment of the local public educational agencies. . . . What may be an acceptable and effective program in a school district serving a rural area may be entirely inappropriate for a school district serving an urban area, and vice versa. There may be circumstances where a school system is basically a low-income area and the best approach in meeting the needs of educationally deprived children would be to upgrade the regular program. On the other hand, in many areas the needs of educationally deprived children will not be satisfied by such an approach."

[16] There is, of course, an important distinction between the broad *power* of Congress to control certain actions of state governmental units, see,

In sum, I simply cannot understand how the Court reaches the conclusion that its disposition of this case accords with the intent of Congress.

Accordingly, I respectfully dissent.

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e. g., *EEOC* v. *Wyoming*, 460 U. S. 226, 244–248 (1983) (STEVENS, J., concurring), and the proper interpretation of congressional action which presumptively should accord state governmental units the broadest measure of respect. See, *e. g.*, *New York Telephone Co.* v. *New York Dept. of Labor*, 440 U. S. 519, 539–540, 545–546 (1979) (opinion of STEVENS, J.).

[17] This thought was echoed in a recent study, which noted that one "Title I administrator compared the current federal Title I role to 'the people who hide in the mountains until the war is over and then come down to kill the dead.'" L. McDonnell & M. McLaughlin, Education Policy and the Role of the States 105 (1982).

BENNETT, SECRETARY OF EDUCATION *v.* KENTUCKY DEPARTMENT OF EDUCATION

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 83-1798. Argued January 8, 1985—Decided March 19, 1985

Title I of the Elementary and Secondary Education Act of 1965, as amended, provided for federal grants to States to support compensatory education programs for disadvantaged children upon the States' assurances that the grants would be used only for eligible programs under Title I. At the time of the grants involved in this case, both the statute and its implementing regulations required that Title I funds be used to supplement, not to supplant, state and local expenditures for education. Federal auditors found that Kentucky had approved Title I programs for fiscal year 1974—involving "readiness classes" offered by some local education agencies for educationally disadvantaged children in place of regular first- and second-grade classes—that violated the prohibitions on supplanting state and local expenditures. Administrative proceedings ultimately resulted in a determination by the Secretary of Education (Secretary) that supplanting had occurred, and the Secretary demanded repayment from the State of the misused Title I funds. In reviewing the administrative order, the Court of Appeals acknowledged that the Secretary's interpretation of the supplanting prohibitions was reasonable and would govern subsequent grants, but concluded that it would be unfair to assess a penalty against Kentucky since there was no evidence of bad faith and the disputed programs complied with a reasonable interpretation of the law.

Held: The Secretary properly determined that Kentucky violated its assurances of compliance with Title I requirements by approving the "readiness classes" and thereby misused Title I funds. Pp. 662–674.

(a) The Court of Appeals erred in characterizing the issue to be the fairness of imposing sanctions against the State for its failure to comply substantially with Title I requirements. Although recovery of misused funds clearly is intended to promote compliance with the requirements of the grant program, a demand for repayment is more in the nature of an effort to collect upon a debt than a penal sanction. Because of the nature of the obligation to repay misused funds, "substantial compliance" with applicable legal requirements does not affect liability. Nor does the absence of bad faith absolve a State from liability if funds were in fact spent contrary to the terms of the grant agreement. And recovery of the misused funds was not barred on the asserted ground that the State did not accept the grant with "knowing acceptance" of its terms. Title I clearly provided that States that chose to participate in the program agreed to abide by Title I's requirements as a condition for receiving funds. *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1, distinguished. Pp. 662–666.

(b) In reviewing a determination by the Secretary that a State has misused Title I funds, a court should consider whether the findings are supported by substantial evidence and reflect an application of the proper legal standards. Although, as asserted by Kentucky, Title I grant agreements have a contractual aspect, the program cannot be viewed in the same manner as a bilateral contract governing a discrete transaction so as to require that any ambiguities with respect to the State's obligations invariably be resolved against the Federal Government as the party who drafted the grant agreement. Given the structure of the grant program, the Federal Government simply cannot prospectively resolve every possible ambiguity concerning particular applications of Title I's requirements. However, it is unnecessary here to adopt the Government's suggestion that the Secretary may rely on any reasonable interpretation of Title I's requirements to determine that previous expenditures violated the grant conditions. Since the State agreed to comply with, and its liability is determined by, the legal requirements in place when the grants were made, the Secretary's interpretation of the requirements should be informed by the statutory provisions, regulations, and other administrative guidelines provided at the time of the grants. Pp. 666–670.

(c) The "readiness classes" approved by Kentucky clearly violated existing statutory and regulatory provisions that prohibited supplanting. Title I funds were used to pay substantially all the costs for the basic education of students in the readiness classes, and absent these classes the participating students would have received instruction in regular classes supported by state and local funds. Although state and local funding was maintained at the level of particular grades, because Title I students were placed in separate classes supported by federal funds, the consequence was to increase per-pupil state and local expenditures for students who remained in regular first- and second-grade classes. No plausible reading of the statute or regulations suggests that such result comported with the prohibitions on supplanting. Moreover, Kentucky has not shown that the Secretary's present position is inconsistent with earlier administrative guidelines. And the possibility that application of the supplanting provisions might be unclear in other contexts does not affect resolution of this case. Pp. 670–673.

717 F. 2d 943, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, MARSHALL, REHNQUIST, and STEVENS, JJ., joined, and in Parts I, II, IV, and V of which WHITE and BLACKMUN, JJ., joined. POWELL, J., took no part in the consideration or decision of the case.

Deputy Solicitor General Geller argued the cause for petitioner. With him on the briefs were *Solicitor General Lee* and *Harriet S. Shapiro.*

Robert L. Chenoweth, Assistant Deputy Attorney General of Kentucky, argued the cause for respondent. With him on the brief was *David L. Armstrong,* Attorney General.*

JUSTICE O'CONNOR delivered the opinion of the Court.†

This case, like *Bennett* v. *New Jersey, ante,* p. 632, concerns an effort by the Federal Government to recover Title I funds that were allegedly misused by a State. There is no contention here that changes in statutory provisions should apply to previous grants. Instead, the dispute is whether the Secretary correctly demanded repayment based on a determination that Kentucky violated requirements that Title I funds be used to supplement, and not to supplant, state and local expenditures for education. Although the Court of Appeals for the Sixth Circuit found that the Secretary's determination was based on a reasonable inter-

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**Fred H. Fishman, Robert H. Kapp, Norman Redlich, William L. Robinson,* and *Norman J. Chachkin* filed a brief for the Lawyers' Committee for Civil Rights Under Law as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the State of Texas et al. by *Richard L. Arnett, Jim Mattox,* Attorney General of Texas, *David Richards,* Executive Assistant Attorney General, *J. Patrick Wiseman,* Assistant Attorney General, *Thomas J. Miller,* Attorney General of Iowa, *Stephen H. Sachs,* Attorney General of Maryland, *Paul L. Douglas,* Attorney General of Nebraska, *Brian McKay,* Attorney General of Nevada, *William E. Isaeff,* Chief Deputy Attorney General, and *L. Duane Woodard,* Attorney General of Colorado; and for the National Association of Counties et al. by *Joyce Holmes Benjamin* and *Stewart A. Baker.*

†JUSTICE WHITE and JUSTICE BLACKMUN join only Parts I, II, IV, and V of this opinion.

pretation of Title I and its implementing regulations, the court nonetheless excused the State from repayment on the grounds that there was no evidence of bad faith and the State's programs complied with a reasonable interpretation of the law. *Kentucky* v. *Secretary of Education*, 717 F. 2d 943, 948 (1983). We granted certiorari, 469 U. S. 814 (1984), and because we disagree with the standard adopted by the Court of Appeals, we reverse.

I

As explained more fully in *Bennett* v. *New Jersey*, *ante*, at 634–636, Title I of the Elementary and Secondary Education Act of 1965, Pub. L. 89–10, 79 Stat. 27, as amended, 20 U. S. C. § 2701 *et seq.*, provided federal grants to support compensatory education programs for disadvantaged children. In order to assure that federal funds would be used to support additional services that would not otherwise be available, the Title I program from the outset prohibited the use of federal grants merely to replace state and local expenditures. This prohibition initially was contained in regulations, see 45 CFR § 116.17(f) (1966); 45 CFR § 116.17(h) (1968), and explained in a program guide distributed to state education agencies. Office of Education, Title I Program Guide No. 44, ¶¶ 4.1, 7.1 (1968). Despite the regulations, the Office of Education[1] received public complaints that Title I funds were being used to replace state and local funds that otherwise would have been spent for participating children. See S. Rep. No. 91–634, pp. 9–10 (1970). Congress responded by amending Title I in 1970 to add a provision that specifically prohibited supplanting. *Id.*, at 9–10, 14–15.

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[1] The Office of Education was the predecessor to the present Department of Education and was responsible for the administration of Title I until 1980. See *Bell* v. *New Jersey*, 461 U. S. 773, 776, n. 1 (1983). Unless the distinction is significant, we will refer to both the Office of Education and the Department of Education as the Department. *Ibid.*

That provision, in effect when the grants involved in this case were made, required that Title I funds be used

> "(i) as to supplement and, to the extent practical, increase the level of funds that would, in the absence of such Federal funds, be made available from non-Federal sources for the education of pupils participating in programs and projects assisted under this subchapter, and (ii) in no case, as to supplant such funds from non-Federal sources." 20 U. S. C. § 241e(a)(3)(B) (1970 ed.).

Title I regulations elaborated upon the statutory prohibition on the use of federal funds to supplant state and local funds:

> "Each application for a grant . . . shall contain an assurance that the use of the grant funds will not result in a decrease in the use for educationally deprived children residing in that project area of State or local funds, which, in the absence of funds under Title I of the Act, would be made available for that project area and that neither the project area nor the educationally deprived children residing therein will otherwise be penalized in the application of State and local funds because of such a use of funds under Title I of the Act. . . . Federal funds made available . . . (1) will be used to supplement, and to the extent practical increase, the level of State and local funds that would, in the absence of such Federal funds, be made available for the education of pupils participating in that project; (2) will not be used to supplant State and local funds available for the education of such pupils." 45 CFR § 116.17(h) (1974).

In 1976, federal auditors found that Kentucky had approved Title I programs for fiscal year 1974 that violated the prohibitions on supplanting. App. 11–21. The disputed programs involved "readiness classes" offered by 50 local education agencies for educationally disadvantaged children in place of regular first- and second-grade classes. App. to Pet. for Cert. 22a. Participating students received their entire academic instruction in the readiness classes, and a substantial number of the students were expected to be promoted to the next higher grade level the following year. App. 16–17. Title I funds were used to pay all the instructional salaries and a portion of the administrative support costs for the readiness classes. App. to Pet. for Cert. 22a. Students in these classes did receive locally funded "enrichment services," *i. e.*, art, physical education, music, and library, that were available to students enrolled in regular classes. *Ibid.* It is not disputed, however, that Title I funds defrayed substantially all the costs of educating students in the readiness classes. App. 15, 17. The auditors concluded that supplanting of state and local expenditures had occurred for children in readiness classes who were promoted to the next higher regular grade. *Id.*, at 17, 19; App. to Pet. for Cert. 30a. Based on this finding, the auditors estimated that $704,237 in Title I funds had been misused, and the Department issued a final determination letter demanding repayment. App. 22–23.

Kentucky sought further administrative review. The Education Appeal Board (Board), after extensive proceedings, issued an initial decision in 1981 sustaining the auditors' findings. App. to Pet. for Cert. 17a–32a. The Board rejected the State's argument that the supplanting provisions were satisfied because state and local funding was not reduced for the school districts, schools, or grade levels involved. *Id.*, at 24a. The statutory and regulatory provisions, the Board concluded, clearly required that state and local expenditures be maintained for *pupils* participating in programs supported by Title I. *Id.*, at 24a–25a. On remand from the Secretary, *id.*, at 33a–35a, the Board reaffirmed its initial decision. *Id.*, at 36a–37a. The Secretary subsequently affirmed the Board's finding that supplanting had occurred, but reduced the demanded repayment to

$338,034 to reflect the benefits presumed to result from smaller pupil-teacher ratios in the readiness classes. *Id.*, at 38a–42a.

In reviewing the final order demanding repayment, the Court of Appeals acknowledged that the Secretary's interpretation of the supplanting prohibition was reasonable and would govern subsequent grants. 717 F. 2d, at 946–947, 948. Nonetheless, the court concluded that Kentucky was not liable for misusing Title I funds during fiscal year 1974. The Court of Appeals viewed the issue to be "the fairness of imposing sanctions upon the Commonwealth of Kentucky for its 'failure to substantially comply' with the requirements [of Title I]." *Id.*, at 947, quoting 20 U. S. C. §§ 1234b(a), 1234c(a). The statute and regulations concerning supplanting, the court maintained, were not "unambiguous." 717 F. 2d, at 948. Moreover, Congress specifically gave state and local officials discretion to develop particular programs to be supported by Title I funds. *Ibid.* In these circumstances, the Court of Appeals concluded that it would be unfair to assess a penalty against Kentucky where there was no evidence of bad faith and the disputed programs complied with a reasonable interpretation of the law. *Ibid.* Relying on *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1, 17 (1981), the court further reasoned that the State did not accept Title I funds with "knowing acceptance" of the condition the Secretary now seeks to impose, and therefore the Federal Government was not justified in demanding repayment. 717 F. 2d, at 950.

II

We note initially that the Court of Appeals erred in characterizing the issue to be the fairness of imposing sanctions against the State for its failure to comply substantially with the requirements of Title I. Although recovery of misused Title I funds clearly is intended to promote compliance with the requirements of the grant program, a demand for repayment is more in the nature of an effort to collect upon a debt than a penal sanction. See *Bell* v. *New Jersey*, 461 U. S. 773, 782 (1983). The State gave certain assurances as a condition for receiving the federal funds, and if those assurances were not complied with, the Federal Government is entitled to recover amounts spent contrary to the terms of the grant agreement. *Id.*, at 791. More specifically, the State gave assurances that Title I funds would be used only for programs which had been reviewed and approved by the state education agency and which met applicable statutory and regulatory requirements. 20 U. S. C. § 241f(a)(1) (1976 ed.). The issue in this case is not the fairness of imposing punitive measures, but instead whether the Secretary properly determined that Kentucky failed to fulfill its assurances by approving programs that violated the requirements of Title I.

Because of the nature of the obligation to repay misused funds, we also disagree with the suggestion by the court below that substantial compliance with applicable legal requirements affects liability. The Court of Appeals relied on provisions which authorize the Secretary, pursuant to specified procedures, to withhold funds or to issue cease-and-desist orders if a recipient fails to comply substantially with the law. 20 U. S. C. §§ 1234b(a), 1234c(a). Cf. § 2836 (specific authority to withhold Title I funds). These references to substantial compliance in provisions governing prospective relief do not by their own terms apply to the recovery of misused funds. Cf. § 1234a(c) (filing of application by recipient for review of audit determination does not affect authority of Secretary to take other adverse actions); 124 Cong. Rec. 20612 (1978) (remarks of Rep. Corrada) (noting that post-audit recovery and withholding are distinct enforcement mechanisms). Other provisions that address the Secretary's authority to demand repayment do not limit liability to instances where there is failure to comply substantially with grant obligations. See §§ 1226a-1, 1234a, 2835(b). This silence cannot be ascribed to legislative inattention to the details concerning recovery of misused funds. Congress specifically limited liability for repayment to expenditures made in the five years preceding the final written notice of liability and also authorized the Secretary, in certain circumstances, to settle claims involving less than $50,000. §§ 1234a(f), 1234a(g). Given the detailed provisions concerning audit determinations contained in § 1234a, we do not believe that Congress intended impliedly to engraft upon that section the "substantial compliance" standard expressly stated in §§ 1234b and 1234c for prospective relief.[2]

Nor do we think that the absence of bad faith absolves a State from liability if funds were in fact spent contrary to the terms of the grant agreement. In *Bell* v. *New Jersey* we explained that where a State obtains grants by providing assurances that the funds will be used on programs that comply with Title I, the State has no right to retain funds that are in fact misused. 461 U. S., at 787, 790–791. See also S. Rep. No. 91–634, at 10, 84 (assurances must be enforced and misused funds recovered). Our discussion in no way suggested that the "misuse" of Title I funds depended on any subjective intent attributable to grant recipients. Instead, *Bell* v. *New Jersey* indicates that funds were misused if the State did not fulfill its assurances that it would abide by the conditions of Title I. 461 U. S., at 790–791. Provisions of the 1978 Amendments clarifying the Secretary's right to recover misused funds also do not condition that right on a recipient's bad faith. Indeed, Congress expressly placed on the grantees the burden of "demonstrat[ing] the allowability of [disputed] expenditures" in proceedings before the Education Appeal Board. 20 U. S. C. § 1234a(b). There is no indication that grantees may avoid repayment by showing that improper expenditures were made in good faith.[3]

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[2] In *Bell* v. *New Jersey* we held that provisions in the 1978 Amendments expressly authorizing judicial review of final decisions by the Secretary or the Board applied retroactively. 461 U. S., at 777–778, and n. 3. We declined to decide, however, whether the provisions allowing the Secretary to recover misused funds were also retroactive, *id.*, at 782, because we held that § 415 of the General Education Provisions Act, Pub. L. 91–230, 84 Stat. 170, 20 U. S. C. § 1226a–1, created a right to impose liability on the States. 461 U. S., at 784, 791. Neither the language of § 415 nor *Bell* v. *New Jersey* suggests that the Secretary's right to recover is affected by a recipient's substantial compliance with the law. Given our conclusion that the references to substantial compliance in §§ 1234b and 1234c do not limit the right to repayment provided in § 1234a, we need not decide whether the latter section is remedial, rather than substantive, and thus retroactive. Cf. *Bennett* v. *New Jersey*, *ante*, at 637 (substantive standards of 1978 Amendments are not retroactive).

Finally, we do not agree that *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1 (1981), bars recovery of misused Title I funds because the State did not accept the grant with "knowing acceptance" of its terms. In *Pennhurst*, we rejected the argument that acceptance of federal grants under the Developmentally Disabled Assistance and Bill of Rights Act, 42 U. S. C. § 6000 *et seq.*, required States to provide mentally handicapped persons with appropriate treatment in the least restrictive environment. Such a requirement, we noted, would have imposed a "massive" and "largely indeterminate" financial obligation on the States. 451 U. S., at 24. We observed: "Congress must express clearly its intent to impose conditions on the grant of federal funds so that the States can knowingly decide whether or not to accept those funds." *Ibid.* The requisite clarity in this case is provided by Title I; States that chose to participate in the program agreed to abide by the requirements of Title I as a condition for receiving funds. *Bell* v. *New Jersey*, 461 U. S., at 790, and n. 17. There was no ambiguity with respect to this condition, and *Pennhurst* does not suggest that the Federal Government may recover misused *federal* funds only if every improper expenditure has been specifically identified and proscribed in advance.

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[3] Although the view of a later Congress does not definitively establish the meaning of an earlier enactment, it does have some persuasive value. *Bell* v. *New Jersey*, 461 U. S., at 784–785. Accordingly, we note that Congress has rejected a proposal to amend the audit provisions to add a substantial compliance standard. See 130 Cong. Rec. H7902–H7903 (July 26, 1984) (§ 808(a) of H. R. 11); *id.*, at H10756 (Oct. 2, 1984) (deletion of § 808(a) in conference). Similarly, when a proposal to excuse liability for funds misused before 1978 was debated and ultimately defeated on a point of order, Members of Congress noted that the Department had sought repayment notwithstanding the absence of bad faith or fraud on the part of recipients. See 127 Cong. Rec. 10644 (1981) (remarks of Sen. Thurmond); *id.*, at 10646 (remarks of Sen. Stennis). These actions suggest that later Congresses understood that liability is not conditioned on substantial compliance or bad faith.

III

In reviewing a determination by the Secretary that a State has misused Title I funds, a court should consider whether the findings are supported by substantial evidence and reflect an application of the proper legal standards. *Bennett* v. *New Jersey*, *ante*, at 646; *Bell* v. *New Jersey*, *supra*, at 792. The disagreement in this case concerns whether the Secretary properly determined that the readiness programs approved by Kentucky violated assurances that Title I funds would be used to supplement state and local expenditures. The Government argues that a reviewing court should simply defer to the Secretary's interpretation of the requirements of Title I so long as it is reasonable. Without disputing the reasonableness of the interpretation advanced by the Secretary, Kentucky contends that because the grant program was in the nature of a contract, any ambiguities with respect to the obligations of the State must be resolved against the party who drafted the agreement, *i. e.*, the Federal Government. Thus, the parties dispute the fundamental nature of the obligations assumed under Title I: the Government suggests that the State guaranteed that the use of the funds would satisfy whatever interpretation of the program requirements the Secretary might reasonably adopt; the State argues that liability for the misuse of funds results only if grants were spent in violation of an unambiguous requirement.

The contentions of the parties can be properly evaluated only against the background of the actual operation of Title I. The grant program provided federal aid for compensatory education for disadvantaged children, but expressly left the selection and development of particular projects to local control. State education agencies approved program applications and monitored compliance by local school districts, obtained funds from the Federal Government, and subsequently channeled the money back to the local level. Thus, the States essentially served as conduits for what became a massive flow of federal funds. Title I grew from an annual appropriation of $959 million in 1966 to more than $3 billion by 1981, and assisted compensatory education programs in every State and in more than 14,000 school districts. See 2 U. S. Dept. of Education, Fiscal Year 1981 Annual Evaluation Report 3 (1981); National Institute of Education, Administration of Compensatory Education xiii (1977) (hereinafter NIE Report). During the period involved in this case, fiscal year 1974, Kentucky received more than $32 million in Title I funds. App. 11.

Although Congress in 1965 articulated the general goals of Title I, the statute and the initial regulations did not precisely outline the permissible means for implementing those goals. Uncertainty in this regard was compounded by the fact that during the first years following the passage of Title I, the Office of Education did not vigorously enforce the requirements of the program. See L. McDonnell & M. McLaughlin, Education Policy and the Role of the States 13, 90–91 (1982); Murphy, Title I of ESEA: The Politics of Implementing Federal Education Reform, 41 Harv. Ed. Rev. 35, 41–45 (1971). In 1970, Congress acknowledged that funds had been misused because of weaknesses in administration, and directed the Office of Education to strengthen its monitoring of the program requirements. S. Rep. No. 91–634, at 8–10. Management of Title I by the Office of Education improved during the 1970's, but problems in clarifying the program requirements remained. See J. Berke & M. Kirst, Federal Aid to Education: Who Benefits? Who Governs? 377–378 (1972). Congress in 1974 directed the NIE to conduct a comprehensive 3-year study of federal compensatory education programs, including Title I. Pub. L. 93–380, § 821, 88 Stat. 599.

The NIE study was the primary impetus for the Education Amendments of 1978. In considering those Amendments, Congress noted evidence that the Office of Education was "implementing administrative requirements in a manner which is neither clear nor consistent, and that this inconsistency is confusing States and local education agencies about their obligations." H. R. Rep. No. 95–1137, p. 49, (1978); S. Rep. No. 95–856, p. 27 (1978). This confusion, Congress observed, resulted in part from the diffuse legal framework for Title I. In addition to the statutory provisions and the regulations, the Office of Education sent program guides to state education agencies explaining the requirements and their application to particular situations. *Id.*, at 34; H. R. Rep. No. 95–1137, at 55. Office of Education Program Review teams visited local Title I projects and provided advice, and the Office also sent interpretative letters in response to state and local inquiries. NIE Report 18, 27; Office of Education, Title I Program Guide No. 24 (1968) (compilation of interpretative letters).

Congress accepted the NIE's conclusion that many of the questions concerning the requirements of Title I would be resolved if the various materials prepared by the Office of Education were "assembled, summarized, and interrelated." S. Rep. No. 95–856, at 34; H. R. Rep. No. 95–1137, at 55. Accordingly, the 1978 Amendments directed the agency to prepare a policy manual compiling the applicable statutes, regulations, advisory opinions, and other materials. 20 U. S. C. § 2837. Congress indicated that such a manual would help to "ensure that federal officials uniformly interpret, apply, and enforce Title I requirements throughout the country." S. Rep. No. 95–856, at 138; H. R. Rep. No. 95–1137, at 161. The NIE study and the extensive review of Title I's administration by Congress indicate that the requirements of the program, while not always clear, evolved and became more specific over time and were explained in materials beyond the statute and its implementing regulations.

Although we agree with the State that Title I grant agreements had a contractual aspect, see *Bennett* v. *New Jersey*, *ante*, at 638, the program cannot be viewed in the same manner as a bilateral contract governing a discrete transaction. Cf. *United States* v. *Seckinger*, 397 U. S. 203, 210 (1970) ("[A] contract should be construed most strongly against the drafter, which in this case was the United States"). Unlike normal contractual undertakings, federal grant programs originate in and remain governed by statutory provisions expressing the judgment of Congress concerning desirable public policy. See R. Cappalli, Rights and Remedies Under Federal Grants 53–55 (1979). Title I, for example, involved multiple levels of government in a cooperative effort to use federal funds to support compensatory education for disadvantaged children. The Federal Government established general guidelines for the allocation and use of funds, and the States agreed to follow those guidelines in approving and monitoring specific projects developed and operated at the local level. Given the structure of the grant program, the Federal Government simply could not prospectively resolve every possible ambiguity concerning particular applications of the requirements of Title I. Cf. *Heckler* v. *Community Health Services of Crawford County, Inc.*, 467 U. S. 51, 64 (1984). Moreover, the fact that Title I was an ongoing, cooperative program meant that grant recipients had an opportunity to seek clarification of the program requirements. Accordingly, we do not believe that ambiguities in the requirements should invariably be resolved against the Federal Government as the drafter of the grant agreement.

We find it unnecessary here to adopt the Government's suggestion that the Secretary may rely on any reasonable interpretation of the requirements of Title I to determine that previous expenditures violated the grant conditions. Our review of the operation of Title I explains how the States assumed an intermediary role in monitoring compliance with requirements that were not always clear. In this particular context, we are reluctant to conclude that the States guaranteed that their performance under the grant agreements would satisfy whatever interpretation of the terms might later be adopted by the Secretary, so long as that interpretation is not "arbitrary, capricious, or manifestly contrary to [Title I]." *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 844 (1984). As we noted in *Bennett* v. *New Jersey, ante*, at 639, 646, the State agreed to comply with, and its liability is determined by, the legal requirements in place when the grants were made. Consequently, in evaluating past expenditures, the Secretary's interpretation of the requirements of Title I should be informed by the statutory provisions, regulations, and other guidelines provided by the Department at that time. As explained *infra*, we have no occasion in this case to address the circumstances, if any, in which the Secretary could impose liability for expenditures made in reliance upon an earlier interpretation provided by the Department, cf. *Bell* v. *New Jersey*, 461 U. S., at 794 (WHITE, J., concurring), or to decide if a State may be held liable where its interpretation of an ambiguous requirement is more reasonable than an interpretation advanced by the Secretary after the grants were made.

IV

We agree with the Secretary that the readiness classes approved by Kentucky clearly violated existing statutory and regulatory provisions that prohibited supplanting. It is undisputed that Title I funds were used to pay substantially all the costs for the basic education of students in the readiness classes. Absent these classes funded by Title I, the participating students would have received instruction in regular classes supported by state and local funds. Both the statutory provision and the implementing regulations expressly required that Title I funds not be used to supplant state and local funds for the *pupils* participating in Title I programs. The statute declared that Title I funds must be used "to supplement . . . the level of funds that would, in the absence of such Federal funds, be made available from non-Federal sources for the education of pupils participating in programs and projects assisted under this subchapter, and . . . in no case, . . . to supplant such funds from non-Federal sources." 20 U. S. C. § 241e(a)(3)(B) (1970 ed.). The applicable regulation similarly provided: "Federal funds made available . . . will be used to supplement, and to the extent practical increase, the level of State and local funds that would . . . be made available for the education of pupils participating in that project [and] will not be used to supplant State and local funds available for the education of such pupils." 45 CFR § 116.17(h) (1974).

Based on the language of the statute and the regulation, we cannot agree that there was an ambiguity whether the supplanting prohibition would be satisfied if state and local funding was maintained at the level of the school district, school, or grade. Separate statutory provisions required that state and local spending not be reduced at the level of school districts, 20 U. S. C. § 241g(c)(2) (1970 ed.); 45 CFR § 116.45 (1974), or individual schools. 20 U. S. C. § 241e(a)(3)(C) (1970 ed.); 45 CFR § 116.26 (1974). See generally NIE Report 9–10 (explaining relationship of various provisions). Although funding was maintained at the level of particular grades, because Title I students were placed in separate classes supported by federal funds, the consequence was to increase per-pupil state and local expenditures for students who remained in regular first- and second-grade classes. No plausible reading of the statute or regulations suggests that this result comports with the prohibitions on supplanting. As noted by the Board, if the State was uncertain on this point, it could have sought clarification from the Office of Education. App. to Pet. for Cert. 27a. In fact, the grant applications approved by the State expressly required the local school districts to explain:

> "How will you organize the program to assure that children participating in the component activity will receive this Title I service in addition to services to which they are ordinarily entitled from state and local school funds?" *Ibid.*

Kentucky, moreover, has not shown that the position now taken by the Secretary is inconsistent with earlier guidelines provided by the Department. The State notes that Office of Education Program Review teams visited schools in Kentucky in which the readiness classes were offered and made no objection to the classes. Nonetheless, Kentucky does not challenge the finding by the Education Appeal Board, see *id.*, at 23a, that there is no evidence in the record that the teams reviewed the financing of the readiness classes.[4] Kentucky further contends that the ambiguity of the supplanting provisions is demonstrated by the fact that the Secretary modified the Board's order to reduce the demanded repayment. This argument is unpersuasive. The modification reflects the Secretary's determination that Title I funds provided some additional benefits to the students in the readiness classes because the classes had smaller pupil-teacher ratios, but it does not cast any doubt on the Board's finding that supplanting occurred.

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[4] At oral argument before the Board, the State argued that some "measure of estoppel" should operate against the Department and moved to reopen the record to present additional evidence. The Board ruled that estoppel would not apply absent affirmative misconduct by the Government, and because Kentucky had not alleged such misconduct, it declined to reopen the record. App. to Pet. for Cert. 28a. The Court of Appeals did not discuss estoppel arguments, and Kentucky acknowledged before this Court that it was not making any estoppel claim. Tr. of Oral Arg. 39, 43. Accordingly, we do not address the application of the defense of estoppel. Cf. *Heckler* v. *Community Health Services of Crawford County, Inc.*, 467 U. S. 51, 60 (1984) (reserving issue of assertion by private party of estoppel against Government).

We note, finally, that the possibility that application of the supplanting provisions might be unclear in other contexts does not affect our resolution of this case. Congress, in considering the 1978 Amendments, observed that the supplanting regulations had been applied in an unclear and inconsistent manner. See H. R. Rep. No. 95–1137, at 29, 49; S. Rep. No. 95–856, at 15, 27. This situation resulted in part from debate within the Office of Education concerning the desirability and practicality of measuring supplanting at the level of expenditures upon individual students. See NIE Report 29–38. Difficult questions of interpretation may well arise in determining if a particular program violated the supplanting provisions, and we do not suggest that the prior position of the Department is irrelevant in this regard. We conclude, however, that the programs approved by Kentucky for fiscal year 1974 clearly violated then-existing requirements for Title I, and therefore neither ambiguity in the application of those requirements to other situations nor the policy debates that later arose within the Office of Education avail the State here.[5]

V

We hold that the Secretary properly determined that Kentucky violated its assurances by approving the readiness classes and thereby misused funds received under Title I. Before the Court of Appeals, Kentucky also challenged the calculation of the amount to be repaid. The Court of Appeals did not address this argument, 717 F. 2d, at 950, and the State may renew its contentions in this regard on remand. Accordingly, the judgment below is reversed, and the case is remanded for further proceedings consistent with this opinion.

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[5] Because the disputed expenditures violated a substantive requirement concerning the use of Title I funds, we do not address in this case whether the Secretary could demand repayment for no more than a technical violation of a grant agreement. Cf. *Bell* v. *New Jersey*, 461 U. S., at 794 (WHITE, J., concurring).

It is so ordered.

JUSTICE POWELL took no part in the consideration or decision of this case.

UNITED STATES *v.* SHARPE ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 83-529. Argued November 27, 1984—Decided March 20, 1985

A Drug Enforcement Administration (DEA) agent, while patrolling a highway in an area under surveillance for suspected drug trafficking, noticed an apparently overloaded pickup truck with an attached camper traveling in tandem with a Pontiac. Respondent Savage was driving the truck, and respondent Sharpe was driving the Pontiac. After following the two vehicles for about 20 miles, the agent decided to make an "investigative stop" and radioed the South Carolina State Highway Patrol for assistance. An officer responded, and he and the DEA agent continued to follow the two vehicles. When they attempted to stop the vehicles, the Pontiac pulled over to the side of the road, but the truck continued on, pursued by the state officer. After identifying himself and obtaining identification from Sharpe, the DEA agent attempted to radio the State Highway Patrol officer. The DEA agent was unable to contact the state officer to see if he had stopped the truck, so he radioed the local police for help. In the meantime, the state officer had stopped the truck, questioned Savage, and told him that he would be held until the DEA agent arrived. The agent, who had left the local police with the Pontiac, arrived at the scene approximately 15 minutes after the truck had been stopped. After confirming his suspicion that the truck was overloaded and upon smelling marihuana, the agent opened the rear of the camper without Savage's permission and observed a number of burlap-wrapped bales resembling bales of marihuana that the agent had seen in previous investigations. The agent then placed Savage under arrest and, returning to the Pontiac, also arrested Sharpe. Chemical tests later showed that the bales contained marihuana. Respondents were charged with federal drug offenses, and, after the District Court denied their motion to suppress the contraband, were convicted. The Court of Appeals reversed, holding that because the investigative stops failed to meet the Fourth Amendment's requirement of brevity governing detentions on less than probable cause, the marihuana should have been suppressed as the fruit of unlawful seizures.

Held: The detention of Savage clearly met the Fourth Amendment's standard of reasonableness. Pp. 682-688.

(a) In evaluating the reasonableness of an investigative stop, this Court examines "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *Terry* v. *Ohio*, 392 U. S. 1, 20. As to the first part of the inquiry, the Court of Appeals assumed that the officers had an articulable and reasonable suspicion that respondents were engaged in marihuana trafficking, and the record abundantly supports that assumption, given the circumstances when the officers attempted to stop the Pontiac and the truck. As to the second part of the inquiry, while the brevity of an investigative detention is an important factor in determining whether the detention is unreasonable, courts must also consider the purposes to be served by the stop as well as the time reasonably needed to effectuate those purposes. The Court of Appeals' decision would effectively establish a *per se* rule that a 20-minute detention is too long to be justified under the *Terry* doctrine. Such a result is clearly and fundamentally at odds with this Court's approach in this area. Pp. 682–686.

(b) In assessing whether a detention is too long in duration to be justified as an investigative stop, it is appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant. Here, the DEA agent diligently pursued his investigation, and clearly no delay unnecessary to the investigation was involved. Pp. 686–688.

712 F. 2d 65, reversed and remanded.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, BLACKMUN, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. BLACKMUN, J., filed a concurring opinion, *post*, p. 688. MARSHALL, J., filed an opinion concurring in the judgment, *post*, p. 688. BRENNAN, J., *post*, p. 702, and STEVENS, J., *post*, p. 721, filed dissenting opinions.

Deputy Solicitor General Frey argued the cause for the United States. With him on the briefs were *Solicitor General Lee*, *Assistant Attorney General Trott*, *Elliott Schulder*, and *Patty Merkamp Stemler*.

Mark J. Kadish, by invitation of the Court, 469 U. S. 809, argued the cause and filed a brief as *amicus curiae* in support of the judgment below.

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to decide whether an individual reasonably suspected of engaging in criminal activity may be detained for a period of 20 minutes, when the detention is necessary for law enforcement officers to conduct a limited investigation of the suspected criminal activity.

I

A

On the morning of June 9, 1978, Agent Cooke of the Drug Enforcement Administration (DEA) was on patrol in an unmarked vehicle on a coastal road near Sunset Beach, North Carolina, an area under surveillance for suspected drug trafficking. At approximately 6:30 a. m., Cooke noticed a blue pickup truck with an attached camper shell traveling on the highway in tandem with a blue Pontiac Bonneville. Respondent Savage was driving the pickup, and respondent Sharpe was driving the Pontiac. The Pontiac also carried a passenger, Davis, the charges against whom were later dropped. Observing that the truck was riding low in the rear and that the camper did not bounce or sway appreciably when the truck drove over bumps or around curves, Agent Cooke concluded that it was heavily loaded. A quilted material covered the rear and side windows of the camper.

Cooke's suspicions were sufficiently aroused to follow the two vehicles for approximately 20 miles as they proceeded south into South Carolina. He then decided to make an "investigative stop" and radioed the State Highway Patrol for assistance. Officer Thrasher, driving a marked patrol car, responded to the call. Almost immediately after Thrasher caught up with the procession, the Pontiac and the pickup turned off the highway and onto a campground road.[1] Cooke and Thrasher followed the two vehicles as the latter drove along the road at 55 to 60 miles an hour, exceeding the speed limit of 35 miles an hour. The road eventually looped back to the highway, onto which Savage and Sharpe turned and continued to drive south.

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[1] Officer Thrasher testified that the respondents' vehicles turned off the highway "[a]bout one minute" after he joined the procession. 4 Record 141.

At this point, all four vehicles were in the middle lane of the three right-hand lanes of the highway. Agent Cooke asked Officer Thrasher to signal both vehicles to stop. Thrasher pulled alongside the Pontiac, which was in the lead, turned on his flashing light, and motioned for the driver of the Pontiac to stop. As Sharpe moved the Pontiac into the right lane, the pickup truck cut between the Pontiac and Thrasher's patrol car, nearly hitting the patrol car, and continued down the highway. Thrasher pursued the truck while Cooke pulled up behind the Pontiac.

Cooke approached the Pontiac and identified himself. He requested identification, and Sharpe produced a Georgia driver's license bearing the name of Raymond J. Pavlovich. Cooke then attempted to radio Thrasher to determine whether he had been successful in stopping the pickup truck, but he was unable to make contact for several minutes, apparently because Thrasher was not in his patrol car. Cooke radioed the local police for assistance, and two officers from the Myrtle Beach Police Department arrived about 10 minutes later. Asking the two officers to "maintain the situation," Cooke left to join Thrasher.

In the meantime, Thrasher had stopped the pickup truck about one-half mile down the road. After stopping the truck, Thrasher had approached it with his revolver drawn, ordered the driver, Savage, to get out and assume a "spread eagled" position against the side of the truck, and patted him down. Thrasher then holstered his gun and asked Savage for his driver's license and the truck's vehicle registration. Savage produced his own Florida driver's license and a bill of sale for the truck bearing the name of Pavlovich. In response to questions from Thrasher concerning the ownership of the truck, Savage said that the truck belonged to a friend and that he was taking it to have its shock absorbers repaired. When Thrasher told Savage that he would be held until the arrival of Cooke, whom Thrasher identified as a DEA agent, Savage became nervous, said that he wanted to leave, and requested the return of his driver's license. Thrasher replied that Savage was not free to leave at that time.

Agent Cooke arrived at the scene approximately 15 minutes after the truck had been stopped. Thrasher handed Cooke Savage's license and the bill of sale for the truck; Cooke noted that the bill of sale bore the same name as Sharpe's license. Cooke identified himself to Savage as a DEA agent and said that he thought the truck was loaded with marihuana. Cooke twice sought permission to search the camper, but Savage declined to give it, explaining that he was not the owner of the truck. Cooke then stepped on the rear of the truck and, observing that it did not sink any lower, confirmed his suspicion that it was probably overloaded. He put his nose against the rear window, which was covered from the inside, and reported that he could smell marihuana. Without seeking Savage's permission, Cooke removed the keys from the ignition, opened the rear of the camper, and observed a large number of burlap-wrapped bales resembling bales of marihuana that Cooke had seen in previous investigations. Agent Cooke then placed Savage under arrest and left him with Thrasher.

Cooke returned to the Pontiac and arrested Sharpe and Davis. Approximately 30 to 40 minutes had elapsed between the time Cooke stopped the Pontiac and the time he returned to arrest Sharpe and Davis. Cooke assembled the various parties and vehicles and led them to the Myrtle Beach police station. That evening, DEA agents took the truck to the Federal Building in Charleston, South Carolina. Several days later, Cooke supervised the unloading of the truck, which contained 43 bales weighing a total of 2,629 pounds. Acting without a search warrant, Cooke had eight randomly selected bales opened and sampled. Chemical tests showed that the samples were marihuana.

B

Sharpe and Savage were charged with possession of a controlled substance with intent to distribute it in violation of 21 U. S. C. § 841(a)(1) and 18 U. S. C. § 2. The United States District Court for the District of South Carolina denied respondents' motion to suppress the contraband, and respondents were convicted.

A divided panel of the Court of Appeals for the Fourth Circuit reversed the convictions. *Sharpe* v. *United States*, 660 F. 2d 967 (1981). The majority assumed that Cooke "had an articulable and reasonable suspicion that Sharpe and Savage were engaged in marijuana trafficking when he and Thrasher stopped the Pontiac and the truck." *Id.*, at 970. But the court held the investigative stops unlawful because they "failed to meet the requirement of brevity" thought to govern detentions on less than probable cause. *Ibid.* Basing its decision solely on the duration of the respondents' detentions, the majority concluded that "the length of the detentions effectively transformed them into de facto arrests without bases in probable cause, unreasonable seizures under the Fourth Amendment." *Ibid.* The majority then determined that the samples of marihuana should have been suppressed as the fruit of respondents' unlawful seizures. *Id.*, at 971. As an alternative basis for its decision, the majority held that the warrantless search of the bales taken from the pickup violated *Robbins* v. *California*, 453 U. S. 420 (1981). Judge Russell dissented as to both grounds of the majority's decision.

The Government petitioned for certiorari, asking this Court to review both of the alternative grounds held by the Court of Appeals to justify suppression. We granted the petition, vacated the judgment of the Court of Appeals, and remanded the case for further consideration in the light of the intervening decision in *United States* v. *Ross*, 456 U. S. 798 (1982). *United States* v. *Sharpe*, 457 U. S. 1127 (1982).

On remand, a divided panel of the Court of Appeals again reversed the convictions. 712 F. 2d 65 (1983). The majority concluded that, in the light of *Ross*, it was required to "disavow" its alternative holding disapproving the warrantless search of the marihuana bales. But, "[f]inding that *Ross* does not adversely affect our primary holding" that the detentions of the two defendants constituted illegal seizures, the court readopted the prior opinion as modified. *Ibid.* The majority declined "to reexamine our principal holding or to reargue the same issues that were addressed in detail in the original majority and dissenting opinions," reasoning that its action complied with this Court's mandate. The panel assumed that "[h]ad [this] Court felt that a reversal was in order, it could and would have said so." *Id.*, at 65, n. 1. Judge Russell again dissented.

We granted certiorari, 467 U. S. 1250 (1984), and we reverse.[2]

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[2] We granted certiorari on June 18, 1984. On August 27, counsel for respondents notified the Court that respondents had become fugitives. On October 1, we directed counsel for respondents to file a brief as *amicus curiae* in support of affirmance of the Court of Appeals' judgment. Because our reversal of the Court of Appeals' judgment may lead to the reinstatement of respondents' convictions, respondents' fugitive status does not render this case moot. See *United States* v. *Villamonte-Marquez*, 462 U. S. 579, 581–582, n. 2 (1983); *Molinaro* v. *New Jersey*, 396 U. S. 365, 366 (1970) *(per curiam)*.

JUSTICE STEVENS would have this Court adopt a rule that, whenever a respondent or appellee before the Court becomes a fugitive before we render a decision, we must vacate the judgment under review and remand with directions to dismiss the appeal. This theory is not supported by our precedents, and indeed would be a break with a recent decision. The line of authority upon which the dissent relies concerns the situation in which a fugitive defendant is the party seeking review here. In those very different cases, dismissal of the petition or appeal is based on the equitable principle that a fugitive from justice is "disentitled" to call upon this Court for a review of his conviction. See *United States* v. *Campos-Serrano*, 404 U. S. 293, 294–295, n. 2 (1971); *Molinaro*, *supra*, at 366; see also *Estelle* v. *Dorrough*, 420 U. S. 534, 541–542 (1975) *(per curiam)*. This equitable

II

A

The Fourth Amendment is not, of course, a guarantee against *all* searches and seizures, but only against *unreasonable* searches and seizures. The authority and limits of the Amendment apply to investigative stops of vehicles such as occurred here. *United States* v. *Hensley*, 469 U. S. 221, 226 (1985); *United States* v. *Cortez*, 449 U. S. 411, 417 (1981); *Delaware* v. *Prouse*, 440 U. S. 648, 663 (1979); *United States* v. *Brignoni-Ponce*, 422 U. S. 873, 878, 880 (1975). In *Terry* v. *Ohio*, 392 U. S. 1 (1968), we adopted a dual inquiry for evaluating the reasonableness of an investigative stop. Under this approach, we examine

> "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *Id.*, at 20.

As to the first part of this inquiry, the Court of Appeals assumed that the police had an articulable and reasonable suspicion that Sharpe and Savage were engaged in marihuana trafficking, given the setting and all the circumstances when the police attempted to stop the Pontiac and the pickup. 660 F. 2d, at 970. That assumption is abundantly supported by the record.[3] As to the second part of the in-

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principle is wholly irrelevant when the defendant has had his conviction nullified and the government seeks review here. Thus, when confronted with precisely this situation in *Florida* v. *Rodriguez*, 469 U. S. 1 (1984) *(per curiam)*, we did not hesitate to reach and decide the merits of the case; had we thought that we should decline to reach every constitutional issue that *might* become moot, we would have denied certiorari. Cf. *Eisler* v. *United States*, 338 U. S. 189, 194 (1949) (Murphy, J., dissenting) ("That the case may become moot if a defendant does not return does not distinguish it from any other case we decide. For subsequent events may render any decision nugatory").

[3] Agent Cooke had observed the vehicles traveling in tandem for 20 miles in an area near the coast known to be frequented by drug traffickers. Cooke testified that pickup trucks with camper shells were often used to

quiry, however, the court concluded that the 30- to 40-minute detention of Sharpe and the 20-minute detention of Savage "failed to meet the [Fourth Amendment's] requirement of brevity." *Ibid.*

It is not necessary for us to decide whether the length of Sharpe's detention was unreasonable, because that detention bears no causal relation to Agent Cooke's discovery of the marihuana. The marihuana was in Savage's pickup, not in Sharpe's Pontiac; the contraband introduced at respondents' trial cannot logically be considered the "fruit" of Sharpe's detention. The only issue in this case, then, is whether it was reasonable under the circumstances facing Agent Cooke and Officer Thrasher to detain Savage, whose vehicle contained the challenged evidence, for approximately 20 minutes. We conclude that the detention of Savage clearly meets the Fourth Amendment's standard of reasonableness.

The Court of Appeals did not question the reasonableness of Officer Thrasher's or Agent Cooke's conduct during their detention of Savage. Rather, the court concluded that the length of the detention alone transformed it from a *Terry* stop into a *de facto* arrest. Counsel for respondents, as *amicus curiae*, assert that conclusion as their principal argument before this Court, relying particularly upon our decisions in *Dunaway* v. *New York*, 442 U. S. 200 (1979); *Florida* v. *Royer*, 460 U. S. 491 (1983); and *United States* v. *Place*, 462 U. S. 696 (1983). That reliance is misplaced.

In *Dunaway*, the police picked up a murder suspect from a neighbor's home and brought him to the police station, where, after being interrogated for an hour, he confessed.

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transport large quantities of marihuana. App. 10. Savage's pickup truck appeared to be heavily loaded, and the windows of the camper were covered with a quilted bed-sheet material rather than curtains. Finally, both vehicles took evasive actions and started speeding as soon as Officer Thrasher began following them in his marked car. See n. 1, *supra*. Perhaps none of these facts, standing alone, would give rise to a reasonable suspicion; but taken together as appraised by an experienced law enforcement officer, they provided clear justification to stop the vehicles and pursue a limited investigation.

The State conceded that the police lacked probable cause when they picked up the suspect, but sought to justify the warrantless detention and interrogation as an investigative stop. The Court rejected this argument, concluding that the defendant's detention was "in important respects indistinguishable from a traditional arrest." 442 U. S., at 212. *Dunaway* is simply inapposite here: the Court was not concerned with the length of the defendant's detention, but with events occurring during the detention.[4]

In *Royer*, government agents stopped the defendant in an airport, seized his luggage, and took him to a small room used for questioning, where a search of the luggage revealed narcotics. The Court held that the defendant's detention constituted an arrest. See 460 U. S., at 503 (plurality opinion); *id.*, at 509 (POWELL, J., concurring); *ibid.* (BRENNAN, J., concurring in result). As in *Dunaway*, though, the focus was primarily on facts other than the duration of the defendant's detention—particularly the fact that the police confined the defendant in a small airport room for questioning.

The plurality in *Royer* did note that "an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop." 460 U. S., at 500. The Court followed a similar approach in *Place*. In that case, law enforcement agents stopped the defendant after his arrival in an airport and seized his luggage for 90 minutes to take it to a narcotics detection dog for a "sniff test." We decided that an investigative seizure of personal property could be justified under the *Terry* doctrine, but that "[t]he length of the detention of respondent's luggage alone precludes the conclusion that the seizure was reasonable in the absence of probable cause." 462 U. S., at 709. However, the rationale underlying that conclusion was premised on the fact that the police knew of respondent's arrival time for several hours beforehand, and the Court assumed that the police could have arranged for a trained narcotics dog in advance and thus avoided the necessity of holding respondent's luggage for 90 minutes. "[I]n assessing the effect of the length of the detention, we take into account whether the police diligently pursue their investigation." *Ibid.;* see also *Royer, supra,* at 500.

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[4] The pertinent facts relied on by the Court in *Dunaway* were that (1) the defendant was taken from a private dwelling; (2) he was transported unwillingly to the police station; and (3) he there was subjected to custodial interrogation resulting in a confession. See 442 U. S., at 212.

Here, the Court of Appeals did not conclude that the police acted less than diligently, or that they *unnecessarily* prolonged Savage's detention. *Place* and *Royer* thus provide no support for the Court of Appeals' analysis.

Admittedly, *Terry*, *Dunaway*, *Royer*, and *Place*, considered together, may in some instances create difficult line-drawing problems in distinguishing an investigative stop from a *de facto* arrest. Obviously, if an investigative stop continues indefinitely, at some point it can no longer be justified as an investigative stop. But our cases impose no rigid time limitation on *Terry* stops. While it is clear that "the brevity of the invasion of the individual's Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion," *United States* v. *Place, supra,* at 709, we have emphasized the need to consider the law enforcement purposes to be served by the stop as well as the time reasonably needed to effectuate those purposes. *United States* v. *Hensley*, 469 U. S., at 228–229, 234–235; *Place, supra,* at 703–704, 709; *Michigan* v. *Summers*, 452 U. S. 692, 700, and n. 12 (1981) (quoting 3 W. LaFave, Search and Seizure § 9.2, pp. 36–37 (1978)). Much as a "bright line" rule would be desirable, in evaluating whether an investigative detention is unreasonable, common sense and ordinary human experience must govern over rigid criteria.

We sought to make this clear in *Michigan* v. *Summers*, *supra:*

> "If the purpose underlying a *Terry* stop—investigating possible criminal activity—is to be served, the police must under certain circumstances be able to detain the

> individual for longer than the brief time period involved in *Terry* and *Adams* [v. *Williams*, 407 U. S. 143 (1972)]." 452 U. S., at 700, n. 12.

Later, in *Place*, we expressly rejected the suggestion that we adopt a hard-and-fast time limit for a permissible *Terry* stop:

> "We understand the desirability of providing law enforcement authorities with a clear rule to guide their conduct. Nevertheless, we question the wisdom of a rigid time limitation. Such a limit would undermine the equally important need to allow authorities to graduate their responses to the demands of any particular situation." 462 U. S., at 709, n. 10.

The Court of Appeals' decision would effectively establish a *per se* rule that a 20-minute detention is too long to be justified under the *Terry* doctrine. Such a result is clearly and fundamentally at odds with our approach in this area.

B

In assessing whether a detention is too long in duration to be justified as an investigative stop, we consider it appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant. See *Michigan* v. *Summers*, *supra*, at 701, n. 14 (quoting 3 W. LaFave, Search and Seizure § 9.2, p. 40 (1978)); see also *Place*, 462 U. S., at 709; *Royer*, 460 U. S., at 500. A court making this assessment should take care to consider whether the police are acting in a swiftly developing situation, and in such cases the court should not indulge in unrealistic second-guessing. See generally *post*, at 712–716 (BRENNAN, J., dissenting). A creative judge engaged in *post hoc* evaluation of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished. But "[t]he fact that the protection of the public might, in the abstract, have been accomplished by 'less intrusive' means does not, by itself, render the search unreasonable." *Cady* v. *Dombrowski*, 413 U. S. 433, 447 (1973); see also *United States* v. *Martinez-Fuerte*, 428 U. S. 543, 557, n. 12 (1976). The question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize or to pursue it.

We readily conclude that, given the circumstances facing him, Agent Cooke pursued his investigation in a diligent and reasonable manner. During most of Savage's 20-minute detention, Cooke was attempting to contact Thrasher and enlisting the help of the local police who remained with Sharpe while Cooke left to pursue Officer Thrasher and the pickup. Once Cooke reached Officer Thrasher and Savage,[5] he proceeded expeditiously: within the space of a few minutes, he examined Savage's driver's license and the truck's bill of sale, requested (and was denied) permission to search the truck, stepped on the rear bumper and noted that the truck did not move, confirming his suspicion that it was probably overloaded. He then detected the odor of marihuana.

Clearly this case does not involve any delay unnecessary to the legitimate investigation of the law enforcement officers. Respondents presented no evidence that the officers were dilatory in their investigation. The delay in this case was attributable almost entirely to the evasive actions of Savage, who sought to elude the police as Sharpe moved his Pontiac to the side of the road.[6] Except for Savage's maneuvers, only a short and certainly permissible pre-arrest detention would likely have taken place. The somewhat longer detention was simply the result of a "graduate[d] . . . respons[e] to the demands of [the] particular situation," *Place, supra*, at 709, n. 10.

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[5] It was appropriate for Officer Thrasher to hold Savage for the brief period pending Cooke's arrival. Thrasher could not be certain that he was aware of all of the facts that had aroused Cooke's suspicions; and, as a highway patrolman, he lacked Cooke's training and experience in dealing with narcotics investigations. In this situation, it cannot realistically be said that Thrasher, a state patrolman called in to assist a federal agent in making a stop, acted unreasonably because he did not release Savage based solely on his own limited investigation of the situation and without the consent of Agent Cooke.

We reject the contention that a 20-minute stop is unreasonable when the police have acted diligently and a suspect's actions contribute to the added delay about which he complains. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

JUSTICE BLACKMUN, concurring.

In view of respondents' fugitive status, see *ante*, at 681–682, n. 2, I would have vacated the judgment of the Court of Appeals and remanded the case to that court with directions to dismiss the respondents' appeal from the District Court's judgment to the Court of Appeals. See *Molinaro* v. *New Jersey*, 396 U. S. 365 (1970).

This Court, however, does not follow that path, and chooses to decide the case on the merits. I therefore also reach the merits and join the Court's opinion.

JUSTICE MARSHALL, concurring in the judgment.

I join the result in this case because only the evasive actions of the defendants here turned what otherwise would have been a permissibly brief *Terry* stop into the prolonged encounter now at issue. I write separately, however, because in my view the Court understates the importance of *Terry's* brevity requirement to the constitutionality of *Terry* stops.

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[6] Even if it could be inferred that Savage was not attempting to elude the police when he drove his car *between* Thrasher's patrol car and Sharpe's Pontiac—in the process nearly hitting the patrol car, see App. 17, 37—such an assumption would not alter our analysis or our conclusion. The significance of Savage's actions is that, whether innocent or purposeful, they made it necessary for Thrasher and Cooke to split up, placed Thrasher and Cooke out of contact with each other, and required Cooke to enlist the assistance of local police before he could join Thrasher and Savage.

I

Terry v. *Ohio*, 392 U. S. 1, 27 (1968), recognized a "narrowly drawn" exception to the probable-cause requirement of the Fourth Amendment for certain seizures of the person that do not rise to the level of full arrests. Two justifications supported this "major development in Fourth Amendment jurisprudence." *Pennslyvania* v. *Mimms*, 434 U. S. 106, 115 (1977) (STEVENS, J., dissenting). First, a legitimate *Terry* stop—brief and narrowly circumscribed—was said to involve a "wholly different kind of intrusion upon individual freedom" than a traditional arrest. *Terry*, 392 U. S., at 26. Second, under some circumstances, the government's interest in preventing imminent criminal activity could be substantial enough to outweigh the still-serious privacy interests implicated by a limited *Terry* stop. *Id.*, at 27. Thus, when the intrusion on the individual is minimal, and when law enforcement interests outweigh the privacy interests infringed in a *Terry* encounter, a stop based on objectively reasonable and articulable suspicions, rather than upon probable cause, is consistent with the Fourth Amendment.[1]

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[1] The following special law enforcement needs have been found sufficient to justify a minimally intrusive stop based on reasonable suspicion: protective weapons searches, *Terry*, *Adams* v. *Williams*, 407 U. S. 143 (1972); border searches for illegal aliens, *United States* v. *Cortez*, 449 U. S. 411 (1981), *United States* v. *Brignoni-Ponce*, 422 U. S. 873 (1975); airport searches for suspected drug trafficking, *Florida* v. *Royer*, 460 U. S. 491 (1983), *United States* v. *Place*, 462 U. S. 696 (1983), *United States* v. *Mendenhall*, 446 U. S. 544 (1980); stops to investigate past felonies, *United States* v. *Hensley*, 469 U. S. 221 (1985). In *Royer*, we referred to stops to investigate "illegal transactions in drugs or other serious crime." 460 U. S., at 499. We have never suggested that all law enforcement objectives, such as the investigation of possessory offenses, outweigh the individual interests infringed upon. Cf. *Brinegar* v. *United States*,

That *Terry* was justified in terms of these two rationales was made clear in subsequent cases. For example, in *Dunaway* v. *New York*, 442 U. S. 200, 210 (1979), we explained that *Terry* rested on two principles:

> "First, it defined a special category of Fourth Amendment 'seizures' so substantially less intrusive than arrests that the general rule requiring probable cause to make Fourth Amendment 'seizures' reasonable could be replaced by a balancing test. Second, the application of this balancing test led the Court to approve this narrowly defined less intrusive seizure on grounds less rigorous than probable cause . . . ."

Similarly, in *United States* v. *Place*, 462 U. S. 696, 703 (1983), the Court held that, "[w]hen the nature and extent of the detention are minimally intrusive of the individual's Fourth Amendment interests, the opposing law enforcement interests can support a seizure based on less than probable cause." See also *id.*, at 704 ("The context of a particular law enforcement practice, of course, may affect the determination whether a brief intrusion on Fourth Amendment interests on less than probable cause is essential to effective criminal investigation"). Even a stop that lasts no longer than necessary to complete the investigation for which the stop was made may amount to an illegal arrest if the stop is more than "minimally intrusive." The stop must first be found not unduly intrusive before any balancing of the government's interest against the individual's becomes appropriate. See also *Michigan* v. *Summers*, 452 U. S. 692, 697–699 (1981).

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338 U. S. 160, 183 (1949) (Jackson, J., dissenting) ("[J]udicial exceptions to the Fourth Amendment . . . should depend somewhat upon the gravity of the offense"). Respondents in this case were suspected of offloading large quantities of drugs from vessels that had recently arrived at the coast, an activity that, under *Place*, triggers sufficiently special and important law enforcement interests to justify a *Terry* stop.

To those who rank zealous law enforcement above all other values, it may be tempting to divorce *Terry* from its rationales and merge the two prongs of *Terry* into the single requirement that the police act reasonably under all the circumstances when they stop and investigate on less than probable cause. Cf. Posner, Rethinking the Fourth Amendment, 1981 S. Ct. Rev. 49, 71. As long as the police are acting diligently to complete their investigation, it is difficult to maintain that law enforcement goals would better be served by releasing an individual after a brief stop than by continuing to detain him for as long as necessary to discover whether probable cause can be established. But while the preservation of order is important to any society, the "needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards." *Almeida-Sanchez* v. *United States*, 413 U. S. 266, 273 (1973). *Terry* must be justified, not because it makes law enforcement easier, but because a *Terry* stop does not constitute the sort of arrest that the Constitution requires be made only upon probable cause.

For this reason, in reviewing any *Terry* stop, the "critical threshold issue is the intrusiveness of the seizure." *United States* v. *Place, supra,* at 722 (BLACKMUN, J., concurring in judgment). Regardless how efficient it may be for law enforcement officials to engage in prolonged questioning to investigate a crime, or how reasonable in light of law enforcement objectives it may be to detain a suspect until various inquiries can be made and answered, a seizure that in duration, scope, or means goes beyond the bounds of *Terry* cannot be reconciled with the Fourth Amendment in the absence of probable cause. See *Dunaway, supra.* Legitimate law enforcement interests that do not rise to the level of probable cause simply cannot turn an overly intrusive seizure into a constitutionally permissible one.

In my view, the length of the stop in and of itself may make the stop sufficiently intrusive to be unjustifiable in the absence of probable cause to arrest.[2] *Terry* "stops" are justified, in part, because they are *stops*, rather than prolonged seizures. "[A] stopping differs from an arrest not in the incompleteness of the seizure but in the brevity of it." 1 W. LaFave & J. Israel, Criminal Procedure §3.8, p. 297 (1984).

Consistent with the rationales that make *Terry* stops legitimate, we have recognized several times that the requirement that *Terry* stops be brief imposes an independent and *per se* limitation on the extent to which officials may seize an individual on less than probable cause. The Court explicitly so held in *Place*, where we invalidated a search that was the product of a lengthy detention; as the Court said: "The length of the detention . . . alone precludes the conclusion that the seizure was reasonable in the absence of probable cause. . . . [T]he 90-minute detention . . . is sufficient to render the seizure unreasonable . . . ."[3] 462 U. S., at 709–710. See also *United States* v. *Hensley*, 469 U. S. 221, 235 (1985) ("[A] detention might well be so lengthy or intrusive as to exceed the permissible limits of a *Terry* stop"); *Florida* v. *Royer*, 460 U. S. 491, 500 (1983) ("[A]n investigative detention must be temporary . . ."); *id.*, at 510–511 (BRENNAN, J., concurring in result) ("[A]ny suggestion that the *Terry* reasonable-suspicion standard justifies anything but the briefest of detentions . . . finds no support in the *Terry* line of cases"); *Summers*, *supra*, at 705, n. 21

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[2] A stop can also be unduly intrusive if the individual is moved or asked to move more than a short distance, if a search is more extensive than necessary to protect the police from an objective fear of danger, or if tactics amounting to custodial interrogation are used. See *Dunaway* v. *New York*, 442 U. S. 200 (1979); *Kolender* v. *Lawson*, 461 U. S. 352, 365 (1983) (BRENNAN, J., concurring).

[3] The majority suggests that the 90-minute detention in *Place* was held too long only because the police had not acted diligently enough. In my view, the statements quoted in text adequately demonstrate that the length of the detention "alone" was "sufficient" to invalidate the seizure.

(questioning legality of "prolonged" detention). A *Terry* stop valid in its inception may become unduly intrusive on personal liberty and privacy simply by lasting too long. That remains true even if valid law enforcement objectives account for the length of the seizure.

The requirement that *Terry* stops be brief no matter what the needs of law enforcement in the particular case is buttressed by several sound pragmatic considerations. First, if the police know they must structure their *Terry* encounters so as to confirm or dispel the officer's reasonable suspicion in a brief time, police practices will adapt to minimize the intrusions worked by these encounters. Cf. *United States* v. *Place*, *supra* (to assure brevity of *Terry* airport stops, narcotic detection dogs must, under some circumstances, be kept in same airport to which suspect is arriving). Firm adherence to the requirement that stops be brief forces law enforcement officials to take into account from the start the serious and constitutionally protected liberty and privacy interests implicated in *Terry* stops, and to alter official conduct accordingly.[4]

Second, a *per se* ban on stops that are not brief yields the sort of objective standards mandated by our Fourth Amendment precedents, standards that would avoid placing courts in the awkward position of second-guessing police as to what constitutes reasonable police practice.[5] We have recognized that the methods employed in a *Terry* stop "should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." *Florida* v.

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[4] We recognized a similar point in *Dunaway:* "A single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront." 442 U. S., at 213–214.

[5] Cf. *Dunaway*, *supra*, at 219–220 (White, J., concurring) (rules defining appropriate *Terry* stops must be fashioned on categorical basis, rather than resolved "in an ad hoc, case-by-case fashion by individual police officers").

Royer, supra, at 500.[6] Yet in the absence of a *per se* requirement that stops be brief, defining what means are "least intrusive" is a virtually unmanageable and unbounded task. Whether the police have acted with due diligence is a function not just of how quickly they completed their investigation, but of an almost limitless set of alternative ways in which the investigation *might* have been completed. For example, in this case the Court posits that the officers acted with due diligence, but they might have acted with more diligence had Cooke summoned two rather than one highway patrolman to assist him, or had Cooke, who had the requisite "training and experience," stopped the pickup truck—the vehicle thought to be carrying the marihuana. See generally *post*, at 712-716 (BRENNAN, J., dissenting). And if due diligence takes as fixed the amount of resources a community is willing to devote to law enforcement, officials in one community may act with due diligence in holding an individual at an airport for 35 minutes while waiting for the sole narcotics detection dog they possess, while officials who have several dogs readily available may be dilatory in prolonging an airport stop to even 10 minutes.

Constitutional rights should not vary in this manner. Yet in the absence of a brevity standard that is independent of the actions or needs of the police, that variance is one of two inescapable results. The other is that the Court will have to take seriously its requirement that the police act with due diligence, which will require the Court to inject itself into such issues as whether this or that alternative investigative method ought to have been employed.[7] Cf. *United States* v. *Martinez-Fuerte*, 428 U. S. 543, 565 (1976) (One purpose of the warrant requirement "is to prevent hindsight from coloring the evaluation of the reasonableness of a search or seizure"). The better and judicially more manageable rule would be a *per se* requirement that *Terry* stops be brief, for that rule would avoid the Court's measuring police conduct according to a virtually standardless yardstick.

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[6] At least we have until today. The language from *Cady* v. *Dombrowski*, 413 U. S. 433, 447 (1973), quoted *ante*, at 687, to the effect that full-scale Fourth Amendment searches may be reasonable even if not accomplished in the least intrusive means is of course wholly inconsistent with the holding of *Royer*. *Cady*, quite obviously, has nothing to do with the *Terry* stop issue here; there the question was whether a search that the Court found legitimate had to be accomplished in any particular way, while here the issue is whether the police have intruded on an individual so substantially as to need probable cause. I assume *Royer*'s holding remains the law on this point, and that the Court's mere quotation out of context of *Cady*, unsupported by any argument or reasoned discussion, is not meant to overrule *Royer*. Legal reasoning hardly consists of finding isolated sentences in wholly different contexts and using them to overrule *sub silentio* prior holdings.

Finally, dissolving the brevity requirement into the general standard that the seizure simply be reasonable will "inevitably produce friction and resentment [among the police], for there are bound to be inconsistent and confusing decisions." Schwartz, Stop and Frisk, 58 J. Crim. L. C. & P. S. 433, 449 (1967). The police themselves may have done nothing unreasonable in holding a motorist for one hour while waiting for a registration computer to come back on line, but surely such a prolonged detention would be unlawful. Indeed, in my view, as soon as a patrolman called in and learned that the computer was down, the suspect would have to be released. That is so not because waiting for information in this circumstance is unreasonable, but simply because the stop must be brief if it is to be constitutional on less than probable cause. A "balancing" test suggests that a stop is invalid only if officials have crossed over some line they should have avoided; the finding that such a "balance" has been struck improperly casts a certain moral opprobrium on official conduct. A brevity requirement makes clear that the Constitution imposes certain limitations on police powers no matter how reasonably those powers have been exercised. "[H]air-splitting distinctions that currently plague our Fourth Amendment jurisprudence" serve nobody's interest, *New York* v. *Quarles*, 467 U. S. 649, 664 (1984) (O'CONNOR, J., concurring in part and dissenting in part), but measuring the legitimacy of a *Terry* stop by the reasonableness and diligence of the official's actions, rather than by the intrusiveness of the stop, would proliferate such distinctions. Maintaining the clarity of *Terry's* brevity requirement will instead breed respect for the law among both police and citizens.

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[7] It is clear from the Court's distaste for the task of "second-guessing" the police, *ante*, at 686, and from JUSTICE BRENNAN's critique of the cursory way in which the Court analyzes the investigative methods employed in this case, that the Court has little intention of choosing this option and taking seriously the requirement that the police act with "due diligence." That demonstrated lack of will makes a strict brevity requirement all the more important.

For these reasons, fidelity to the rationales that justify *Terry* stops requires that the intrusiveness of the stop be measured independently of law enforcement needs. A stop must first be found not unduly intrusive, particularly in its length, before it is proper to consider whether law enforcement aims warrant limited investigation.

II

We have had little occasion to specify the length to which a stop can be extended before it can no longer be justified on less than probable cause. But see *United States* v. *Place*, 462 U. S. 696 (1983) (90-minute seizure too long). In *Terry* and *Adams* v. *Williams*, 407 U. S. 143, 146 (1972), we described the stop simply as "brief." In *United States* v. *Brignoni-Ponce*, 422 U. S. 873, 880 (1975), we upheld a "modest" stop that "usually consumed no more than a minute." *Dunaway* v. *New York*, 422 U. S. 200 (1979), *United States* v. *Martinez-Fuerte*, *supra*, at 558, and *United States* v. *Hensley*, 469 U. S. 221 (1985), drew upon *Terry* to characterize permissible stops as "brief" ones; *Florida* v. *Royer*, 460 U. S. 491 (1983), described a legitimate *Terry* stop as "temporary." Those stops upheld in these cases all lasted no more than a few minutes before probable cause was established.[8]

The Court has "decline[d] to adopt any outside time limitation for a permissible *Terry* stop." *Place*, *supra*, at 709. While a *Terry* stop must be brief no matter what the needs of the authorities, I agree that *Terry*'s brevity requirement is not to be judged by a stopwatch but rather by the facts of particular stops. At the same time, the time it takes to "briefly stop [the] person, ask questions, or check identification," *United States* v. *Hensley*, *supra*, at 229, and, if warranted, to conduct a brief pat-down for weapons, see *Terry*, is typically just a few minutes. In my view, anything beyond this short period is presumptively a *de facto* arrest. That presumption can be overcome by showing that a lengthier detention was not unduly *intrusive* for some reason; as in this case, for example, the suspects, rather than the police, may have prolonged the stop.[9] It cannot, however, be overcome simply by showing that police needs required a more intrusive stop. For that reason, I regard the American Law Institute's suggested maximum of 20 minutes[10] as too long; "any suggestion that the *Terry* reasonable-suspicion standard justifies anything but the briefest of detentions or the most limited of searches finds no support in the *Terry* line of cases." *Royer*, *supra*, at 510–511 (BRENNAN, J., concurring in result).

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[8] In *Michigan* v. *Summers*, 452 U. S. 692, 700, n. 12 (1981), the Court noted that, under some circumstances, a valid stop could last longer "than the brief time period involved in *Terry* and *Adams*." As my concurrence today indicates, I agree that the length of the actual stop in *Terry* does not establish a firm outer limit beyond which no valid stop can ever go. However, nothing in the record in *Summers* revealed how long the stop there took, 452 U. S., at 711, n. 3 (Stewart, J., dissenting), and this statement from *Summers* must be read against the peculiarly unintrusive setting of a stop that took place within the defendant's own residence.

[9] See n. 11, *infra*.

[10] See ALI, Model Code of Pre-Arraignment Procedure § 110.2(1) (1975).

Difficult questions will no doubt be presented when during these few minutes an officer learns enough to increase his suspicions but not enough to establish probable cause. But whatever the proper resolution of this problem, the very least that ought to be true of *Terry*'s brevity requirement is that, if the initial encounter provides no greater grounds for suspicion than existed before the stop, the individual must be free to leave after the few minutes permitted for the initial encounter. Such a clear rule would provide officials with necessary and desirable certainty and would adequately protect the important liberty and privacy interests upon which *Terry* stops infringe.

III

In light of these principles, I cannot join the Court's opinion. The Court offers a hodgepodge of reasons to explain why the 20-minute stop at issue here was permissible. At points we are told that the stop was no longer than "necessary" and that the police acted "diligently" in pursuing their investigation, all of which seems to suggest that, as long as a stop is no longer than necessary to the "legitimate investigation of the law enforcement officers," the stop is perfectly lawful. See *ante*, at 677, 685, 686. As I have just argued, such reasoning puts the horse before the cart by failing to focus on the critical threshold question of the intrusiveness of the stop, particularly its length. With respect to that question, the Court seems in one breath to chastise the Court of Appeals for concluding that the length of a detention alone can transform a *Terry* stop into a *de facto* arrest, see *ante*, at 680, 682–683, while in another breath the Court acknowledges that, "if an investigative stop continues indefinitely, at some point it can no longer be justified as an investigative stop." *Ante*, at 685.

Fortunately, it is unneccessary to try to sort all of this out, for another rationale offered by the Court adequately disposes of this case. As the Court recognizes: "The delay in this case was attributable almost entirely to the evasive actions of Savage, who sought to elude the police as Sharpe moved his Pontiac to the side of the road. Except for Savage's maneuvers, only a short and certainly permissible pre-arrest detention would likely have taken place." *Ante*, at 687–688. With that holding I agree.[11] Had Savage pulled over when signalled to, as did Sharpe, Savage and Sharpe both would have been subjected to only a permissibly brief *Terry* stop before the odor of the marihuana would have given the officers probable cause to arrest.[12] Once Cooke caught back up with Savage, only a few minutes passed before Cooke smelled the marihuana. During these few brief minutes, Savage was subjected to no more than the identification request and minimal questioning, designed to confirm or dispel the reasonable suspicion causing the stop, that is legitimate under *Terry*. While a 20-minute stop would, under most circumstances, be longer than the limited intrusion entailed by the brief stop that *Terry* allows, I believe such a stop is permissible when a suspect's own actions are the primary cause for prolonging an encounter beyond the bounds to which *Terry*'s brevity requirement ordinarily limits such stops. Nothing more is necessary to decide this case, and any further suggestions in the Court's opinion I find unwarranted, confusing, and potentially corrosive of the principles upon which *Terry* is grounded.

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[11] The District Court stated that the stop "took a little longer than it should have taken. They created their own problem." 4 Record 221. Immediately after making this statement, the District Court ruled the stop lawful. *Id.*, at 221–222. From the context in which the statement was made—a direct response to the Government's argument that "each case has to more or less stand on its own facts" and that here the defendants were the cause of the overly lengthy detention—I have little doubt that the "they" referred to was the defendants. Because the District Court issued no express findings of fact, this statement, like other statements relied on to define the underlying facts, must be read in the light most faithful to the context in which it was uttered.

[12] No question is presented as to whether odor that creates probable cause also justifies a warrantless search. See *Johnson* v. *United States*, 333 U. S. 10, 13 (1948) ("[O]dors alone do not authorize a search without warrant"). That issue was not decided in *United States* v. *Johns*, 469 U. S. 478, 486 (1985), for there the warrantless search was justified by the automobile exception created in *United States* v. *Ross*, 456 U. S. 798 (1982). I of course disagree with the theory of *Ross*, see *id.*, at 827 (MARSHALL, J., dissenting), but I concur in the judgment here because no question is presented as to the validity of the warrantless search and seizure of the burlap-covered bales removed from the truck driven by Savage.

IV

I also cannot join the Court's opinion because it reaches out to decide a wholly distinct issue not presented and not capable of being treated fairly without further development of a factual record. The Court of Appeals assumed, without deciding, that an objectively reasonable suspicion of criminal activity existed to justify these stops. The District Court, after listening to the officers explain the basis on which they purported to make the stop, and after testimony taking up 450 pages of transcript, found the legality of the initial stop to present "a real close question." App. 45. This question was not presented in the certiorari petition and not a single word is devoted to it in the briefs. Yet in what can only be construed as a thinly disguised attempt to decide the question, the Court, from its position atop the judicial system, concludes that the Court of Appeals' assumption *arguendo* that the stop was legal is "abundantly" supported by the record, *ante*, at 682—an abundance not evident to the District Court. Cf. *Anderson* v. *Bessemer City*, *ante*, p. 564 (district court credibility determinations entitled to strongest deference).

Of course, the proper approach to this issue is illustrated by *United States* v. *Place*, 462 U. S., at 700, n. 1, where, as here, the Court of Appeals had assumed the existence of reasonable suspicion and certiorari had not been granted on the question; the Court correctly concluded that it had "no occasion to address the issue here." *Ibid.* Consistency, however, hardly has been a hallmark of the current Court's Fourth Amendment campaigns.

Moreover, aside from the fact that the reasonable-suspicion issue was not presented, briefed, or argued by the parties, the Court's handling of this issue reveals the defects of engaging in an airy factual inquiry unaided by full lower court review. First, the Court ignores relevant evidence relied on by the District Court when the latter concluded that, although the question was "real close," the initial stop was lawful; for example, the Court does not refer to evidence before the District Court regarding how common it would have been for a pickup truck like that driven by Savage to be found in this area. See Defendant's Exhibit 10. Perhaps a stop of a particular type of truck would be reasonable in some areas and not in others, which is why evidence was submitted on the number of such trucks in this area; but in its haste to validate the actions here, the Court seems to suggest that pickup trucks with camper shells are always, anywhere items engendering reasonable suspicion. Second, the Court makes ill-considered inferences to concoct those few facts upon which it does rely to uphold the initial stop. The Court first asserts that both drivers "started speeding as soon as Officer Thrasher began following them in his marked car," *ante*, at 683, n. 3, and then suggests that respondents sped because they noticed Thrasher and were seeking to evade him. Thrasher, however, had joined the caravan at least one minute before respondents began speeding. 4 Record 140–141. In addition, respondents did not speed until they left the highway, at which point they continued at their highway speed of 55 to 60 miles an hour through a 3-mile campground road for which the posted limit was 35 miles an hour. Any implication that respondents sped *because* they noticed Thrasher or to "evade" the officers is unsupported by common sense or by the record. Sharpe and Savage hardly could have expected to "evade" the police on a 3-mile closed loop through a campground, and if the Court's speculation that they noticed Thrasher's car is correct, one certainly doubts they would have intentionally attracted attention to themselves by beginning to speed. Finally, the District Court's view on the reasonable-suspicion issue may well have been colored by the fact that "several" other of these essentially profile stops were made that morning, including stops of four or five four-wheel drive vehicles, and yet no other drug arrests were made. *Id.*, at 127–128. If after two days and 450 pages of testimony the District Court concluded that the reasonableness and articulability of the officers' suspicion presented a "close question," and if the Court today has less factual information before it and must rely on questionable inferences to elicit even those few facts upon which it does rely, one would hope the Court would act with greater restraint than to speculate whether the "assumption" of reasonable suspicion is "abundantly" supported by the record. But any such hope would evidently be merely idle fancy with respect to a Court so anxious to address an unpresented issue that it blithely hurdles over the jurisdictional and jurisprudential principles that ought to stand in its way.

V

In my view, the record demonstrates that the lengthy stop at issue in this case would have been permissibly brief but for the respondents' efforts to evade law enforcement officials. Accordingly, I agree with the Court's judgment. But because there is no way to fathom the extent to which the majority's holding rests on this basis, and because the majority acts with unseemly haste to decide other issues not presented, I join only its judgment.

JUSTICE BRENNAN, dissenting.

The respondent William Sharpe and his passenger were pulled over to the side of the highway, concededly without probable cause, and held for more than 30 minutes, much of that time in the back seat of a police cruiser, before they ultimately were arrested and informed of the charges against them. In the meantime, the respondent Donald Savage was stopped one-half mile down the road, also according to the Court without probable cause. He was ordered out of his pickup truck at gunpoint, spread-eagled and frisked, and questioned by the detaining patrolman, Kenneth Thrasher, about a suspected shipment of marihuana in his vehicle. Although Savage repeatedly asked to be released, Thrasher held him for almost 15 minutes until DEA Agent Luther Cooke, the officer who had stopped Sharpe back up the road, could arrive and sniff the vehicle's windows to determine whether he could smell the suspected marihuana. As Thrasher later conceded, Savage "was under custodial arrest" the entire time. 4 Record 165.

The Court today concludes that these lengthy detentions constituted reasonable investigative stops within the meaning of *Terry* v. *Ohio*, 392 U. S. 1 (1968). It explains that, although the length of an investigative stop made without probable cause may at some point become so excessive as to violate the Fourth Amendment, the primary inquiry must nevertheless be whether the investigating officers acted "diligently" in pursuing a stop that was no longer than "necessary" to the "legitimate investigation of the law enforcement officers." *Ante*, at 687. The Court reasons that *Terry's* brevity requirement is in fact an accordion-like concept that may be expanded outward depending on "the law enforcement purposes to be served by the stop." *Ante*, at 685. Applying this analysis to the instant case, the Court concludes that the lengthy detentions of Sharpe and Savage were reasonable because the delay was the fault of Savage, whom the Court contends "sought to elude the police" by speeding away when signaled to stop; had Savage not taken these "evasive actions," Agent Cooke could have questioned Sharpe and Savage together and "only a short and certainly permissible pre-arrest detention would likely have taken place." *Ante*, at 688.

I dissent. I have previously expressed my views on the permissible scope and duration of *Terry* stops, and need not recount those views in detail today. See, *e. g.*, *United States* v. *Place*, 462 U. S. 696, 710 (1983) (BRENNAN, J., concurring in result); *Kolender* v. *Lawson*, 461 U. S. 352, 362 (1983) (BRENNAN, J., concurring); *Florida* v. *Royer*, 460

U. S. 491, 509 (1983) (BRENNAN, J., concurring in result). I write at some length, however, because I believe the Court's opinion illustrates several disturbing trends in our disposition of cases involving the rights of citizens who have been accused of crime. First, the Court increasingly tends to reach out and decide issues that are not before it. If the facts in this case are as the Court recounts them, for example, the propriety of these lengthy detentions would not appear to be governed by the *Terry* line of cases at all, and the Court's opinion is therefore little more than 13 pages of ill-considered dicta. Second, the Court of late shows increasing eagerness to make purely factual findings in the first instance where convenient to support its desired result. For example, the Court's conclusion in this case that Savage "sought to elude the police" is a *de novo* factual determination resting on a record that is ambiguous at best. Finally, the Court in criminal cases increasingly has evaded the plain requirements of our precedents where they would stand in the way of a judgment for the government. For a *Terry* stop to be upheld, for example, the government must show at a minimum that the "least intrusive means reasonably available" were used in carrying out the stop. *Florida* v. *Royer*, *supra*, at 500 (opinion of WHITE, J.).[1] The Government has made no such showing here, and the Court's bald assertion that "[c]learly this case does not involve any delay unnecessary" to "legitimate" law enforcement, *ante*, at 687, is completely undermined by the record before us.

I

The Court portrays the circumstances leading up to these detentions with a studied flourish. Before Sharpe and Savage were stopped, we are told, they "took evasive actions and started speeding as soon as Officer Thrasher began following them in his marked car." *Ante*, at 683, n. 3. When the two were signaled to stop, Savage's "pickup truck cut between the Pontiac and Thrasher's patrol car, nearly hitting the patrol car, and continued down the highway." *Ante*, at 678. Savage, in other words, "sought to elude the police as Sharpe moved his Pontiac to the side of the road." *Ante*, at 688. As a result of Savage's "evasive actions" and "maneuvers," Thrasher had to chase after him and leave Agent Cooke with Sharpe, thereby laying the groundwork for the challenged delay. *Ibid.*

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[1] Concurring in the plurality's result in *Royer*, I argued that the Fourth Amendment requires an even more stringent standard: "a lawful stop must be so strictly limited that it is difficult to conceive of a less intrusive means that would be effective to accomplish the purpose of the stop." 460 U. S., at 511, n.

If the facts are as the Court relates them, it is not readily apparent why the Court insists on using this case as a vehicle for expanding the outer bounds of *Terry* investigative stops. I had thought it rather well established that where police officers reasonably suspect that an individual may be engaged in criminal activity, and the individual deliberately takes flight when the officers attempt to stop and question him, the officers generally no longer have mere reasonable suspicion, but probable cause to arrest. See, *e. g.*, *Peters* v. *New York*, decided together with *Sibron* v. *New York*, 392 U. S. 40, 66–67 (1968) (companion case to *Terry*) ("[D]eliberately furtive actions and flight at the approach of strangers or law officers are strong indicia of *mens rea*, and when coupled with specific knowledge on the part of the officer relating the suspect to the evidence of crime, they are proper factors to be considered in the decision to make an arrest"). See also *Kolender* v. *Lawson*, *supra*, at 366, n. 4 (BRENNAN, J., concurring) ("[S]ome reactions by individuals to a properly limited *Terry* encounter, . . . such as flight, may often provide the necessary information, in addition to that which the officers already possess, to constitute probable cause"); *Henry* v. *United States*, 361 U. S. 98, 103 (1959) (suspicious circumstances did not ripen into probable cause because defendants' "movements in the car had no mark of fleeing men or men acting furtively"); *Husty* v. *United States*, 282 U. S. 694, 701 (1931) ("prompt attempt . . . to escape when hailed by the officers," when coupled with other suspicious evidence, ripened into probable cause).[2]

Of course, flight *alone* cannot give rise to probable cause; it must be coupled with pre-existing reasonable and articulable suspicion. See 1 W. LaFave, Search and Seizure § 3.6, p. 669 (1978).[3] And the act of flight must reasonably appear to be in response to the presence of the authorities.[4] Here, however, the Court accepts the questionable premise that the officers already had reasonable suspicion when they decided to stop the vehicles,[5] and it boldly concludes that Sharpe and Savage "started speeding" at Thrasher's approach, that Savage "sought to elude the police" when Thrasher attempted the stop, and that Savage took "evasive actions." *Ante*, at 683, n. 3, 688.

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[2] See generally 1 W. LaFave, Search and Seizure § 3.6, p. 669 (1978) ("[I]f there already exists a significant degree of suspicion concerning a particular person, the flight of that individual upon the approach of the police may be taken into account and may well elevate the pre-existing suspicion up to the requisite Fourth Amendment level of probable cause"). Representative federal and state cases applying this principle include *United States* v. *Martinez-Gonzalez*, 686 F. 2d 93, 100 (CA2 1982) ("The event that transformed the agents' reasonable suspicion into probable cause was Martinez's own manifestation of guilt evidenced by his flight from the agents back into the apartment when the agents approached him to talk to him"); *United States* v. *Green*, 216 U. S. App. D. C. 329, 333–334, 670 F. 2d 1148, 1152–1153 (1981); *United States* v. *Gomez*, 633 F. 2d 999, 1007–1008 (CA2 1980), cert. denied, 450 U. S. 994 (1981); *United States* v. *Vasquez*, 534 F. 2d 1142, 1145–1146 (CA5), cert. denied, 429 U. S. 979 (1976); *People* v. *Amick*, 36 Cal. App. 3d 140, 144–145, 111 Cal. Rptr. 280, 282–283 (1973); *People* v. *Holdman*, 73 Ill. 2d 213, 221–222, 383 N. E. 2d 155, 158–159 (1978), cert. denied, 440 U. S. 938 (1979); *Commonwealth* v. *Ortiz*, 376 Mass. 349, 353–354, 380 N. E. 2d 669, 673 (1978); *People* v. *Kreichman*, 37 N. Y. 2d 693, 698–699, 339 N. E. 2d 182, 187–188 (1975) (attempt to stop vehicle on reasonable suspicion, followed by 14-block chase, created probable cause); *Commonwealth* v. *Dennis*, 236 Pa. Super. 348, 351, 344 A. 2d 713, 715 (1975).

[3] "Were it otherwise, 'anyone who does not desire to talk to the police and who either walks or runs away from them would always be subject to legal arrest,' which can hardly 'be countenanced under the Fourth and Fourteenth Amendments.'" 1 LaFave, *supra*, at 669, quoting *United States* v. *Margeson*, 259 F. Supp. 256, 265 (ED Pa. 1966).

[4] Compare *Wong Sun* v. *United States*, 371 U. S. 471, 482 (1963) ("[W]hen an officer insufficiently or unclearly identifies his office or his mission, the occupant's flight from the door must be regarded as ambiguous conduct"), with *People* v. *Amick*, *supra*, at 145, 111 Cal. Rptr., at 283

Thus if the facts were as the Court describes them, I would be inclined to view this as a probable-cause detention, and the reasonableness of these stops under *Terry* would not appear to be before us. The Court's failure even to consider this question of probable cause is baffling, but ultimately in keeping with its recent practice in *Terry* cases of reaching out far beyond what is required to resolve the cases at hand so as more immediately to impose its views without the bother of abiding by the necessarily gradual pace of case-by-case decisionmaking. See, *e. g., United States* v. *Place*, 462 U. S., at 711, 714–720 (BRENNAN, J., concurring in result); *Florida* v. *Royer*, 460 U. S., at 509, 511, n. (BRENNAN, J., concurring in result).

II

The Court's opinion is flawed in another critical respect: its discussion of Savage's purported attempt "to elude the police" amounts to nothing more than a *de novo* factual finding made on a record that is, at best, hopelessly ambiguous. Neither the District Court nor the Court of Appeals ever found that Savage's actions constituted evasion or flight. If we are nevertheless to engage in *de novo* factfinding, I

("[The police] had a right to and did assume that at that time [the driver and his passengers] knew law enforcement officials wanted to talk to them; and upon being pursued by the black and white unit and Officer Kapphahn with red spotlight and siren there could be little doubt that [the occupants] knew they were being pursued by officers although they failed to stop and continued for a quarter of a mile until they were forced to stop").

[5] See n. 9, *infra*.

submit the Court has taken insufficient account of several factors.

First, Savage's actions in continuing to drive down the highway could well have been entirely consistent with those of any driver who sees the police hail someone in front of him over to the side of the road. Sharpe's Pontiac was at least several car lengths in front of Savage's pickup truck; Thrasher thought there was a separation of "a car length or two," while Cooke testified that the distance was anywhere from between 30–50 and 100–150 feet. 3 Record 65; 4 *id.*, at 139. Approaching in the far-left lane, Thrasher pulled even with Sharpe's lead vehicle, "turned the blue light on," "blew the siren," and "motioned for *him* to pull over." *Id.*, at 145 (emphasis added). Savage moved into the right lane so as to avoid hitting Thrasher, who was slowing along with Sharpe, and continued on his way. Neither Cooke nor Thrasher ever testified that Savage "sought to elude" them, and there is nothing here that is necessarily inconsistent with the actions of any motorist who happens to be behind a vehicle that is being pulled over to the side of the road.

This view of the record is strongly reinforced by Thrasher's inability on the stand to give a responsive answer to the question: "Would you say the pickup truck was attempting to allude *[sic]* you or just passed you by thinking you had stopped the car?" 3 *id.*, at 84. Thrasher replied with the nonanswer that "[w]ell, I was across . . . partially in two lanes and he got by me in the other lane," *ibid.*—an observation that could be made about any motorist driving by a stop-in-progress.

Finally, the "[f]ail[ure] to stop [a] motor vehicle when signaled by [a] law-enforcement vehicle" is an independent traffic violation in South Carolina.[6] Thrasher testified that

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[6] South Carolina Code § 56–5–750 (1976) provides: "It shall be unlawful for any motor vehicle driver, while driving on any road, street or highway of the State, to fail to stop when signaled by any law-enforcement vehicle by means of a siren or flashing light. Any attempt to increase the speed of a vehicle or in other manner avoid the pursuing law-enforcement vehicle

Savage was guilty of a number of traffic violations, and when asked to specify what these violations were he enumerated that (1) Savage had been speeding through the campground, and (2) the pickup truck had improper license tags. *Id.*, at 94–95, 99. If Savage in fact had been signaled to stop his truck and had taken "evasive actions" and "sought to elude the police," *ante*, at 688, I find it curious that Thrasher did not include these actions in his litany of Savage's traffic offenses.

None of these factors, singularly or together, show beyond a doubt that Savage proceeded innocently past the stop of Sharpe. But given that it is the Government's burden to prove facts justifying the duration of the investigative detention, *Florida* v. *Royer*, *supra*, at 500 (opinion of WHITE, J.), and given that the courts below never found that Savage "sought to elude" the authorities,[7] the Court's conclusion to the contrary is extremely disturbing. I do not believe that citizens should be deemed to have forfeited important Fourth Amendment safeguards on the basis of a cold record as ambiguous as the one before us. Today's opinion unfortunately is representative of a growing number of instances in which the Court is willing to make *de novo* factual findings in criminal cases where convenient to support its decisions.[8] Even if the Court had the time and inclination to engage in the "con-

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when signaled by a siren or flashing light shall constitute prima facie evidence of a violation of this section. . . ."

[7] The Court of Appeals did not discuss this issue one way or the other. The closest that the District Court came to passing on the question was an ambiguous statement during a colloquy that the stop "took a little longer than it should have taken. They created their own problem." 4 Record 221. The court's reference to "they" arguably could have been to Sharpe and Savage, but such a construction is tenuous given the court's previous comment that the stop took longer "than it *should* have taken"—which seems to be addressed to the actions of the officers. The Government quite properly has never sought to distill from this ambiguous remark a "finding" that Savage took "evasive actions" or "sought to elude the police."

[8] See, *e. g.*, *Oregon* v. *Elstad*, *ante*, at 360–362 (BRENNAN, J., dissenting); *United States* v. *Young*, *ante*, at 30–35 (BRENNAN, J., concurring in

scientious and detailed examination of the record" required in fairly making purely factual judgments of this sort, *United States* v. *Hasting*, 461 U. S. 499, 517 (1983) (STEVENS, J., concurring in judgment), such exercises of our authority would nevertheless be improper. The Court's institutional role in this context should be focused on resolving "important questions of federal law" and on "ensuring clarity and uniformity of legal doctrine," *United States* v. *Young*, *ante*, at 34 (BRENNAN, J., concurring in part and dissenting in part), rather than on serving as the prosecution's factfinder of last resort.[9]

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part and dissenting in part); *United States* v. *Hasting*, 461 U. S. 499, 516-519 (1983) (STEVENS, J., concurring in judgment).

[9] Like JUSTICE MARSHALL, *ante*, at 700–702 (concurring in judgment), I cannot understand why the Court feels compelled to decide that the District Court's finding of reasonable suspicion "is abundantly supported by the record," *ante*, at 682. The Court of Appeals merely assumed that the reasonable-suspicion finding was proper for the sake of analysis, 660 F. 2d 967, 970 (CA4 1981), and the question was not presented for our consideration. The District Court considered the issue "a real close question," emphasized its "great reluctance" on the merits, and found that the Government had barely established reasonable suspicion "by the greater weight of the evidence" but that it had not shown sufficient suspicion beyond a reasonable doubt. 5 Record 152–155, 190.

The Court has taken insufficient account of several factors. First, these detentions were little more than "profile stops" similar to numerous stops of campers and recreational vehicles carried out by the DEA in the general area on the day in question; none of these other questionable profile stops turned up any evidence of wrongdoing. 4 *id.*, at 126–127, 190. See also 3 *id.*, at 70–71 (DEA "set up roadblocks in that particular area and did stop a number of vehicles with roadblocks"). Second, there is nothing in the record to support the Court's assertion that Sharpe and Savage "started speeding as soon as Officer Thrasher began following them in his marked car." *Ante*, at 683, n. 3; see *ante*, at 701 (MARSHALL, J., concurring in judgment). To the extent the Court suggests that they were attempting to speed away at Thrasher's approach, this factual finding is inconsistent with Thrasher's concession that Sharpe and Savage *stopped* at every stop sign and traffic light they encountered—lawful conduct that hardly comports with notions of a high-speed attempt to elude the authorities. 4

III

A

Because it has not been shown that Savage "sought to elude" the police, I agree with the Court that the constitutional propriety of these detentions is governed by *Terry* and its progeny. These precedents lead inexorably to the conclusion that the investigative actions at issue here violated the Fourth Amendment. As the Fourth Circuit emphasized, the lengthy detentions of Sharpe and Savage did not accord with *Terry*'s threshold brevity requirement. 660 F. 2d 967, 970 (1981).[10] But even if the length of these detentions did not *alone* compel affirmance of the Fourth Circuit's judgment, the Court today has evaded a further requirement of our *Terry* precedents: that "the investigative methods employed should be the least intrusive means reasonably available to

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Record 142–143. Finally, it appears strongly that the reason these profile stops were made when they were was *not* because Cooke's "reasonable" suspicions had hardened, but because he was about to run out of gas. See Defendant's Ex. 1, pp. 4–5 (Cooke's discussion with Thrasher over police radio) ("We're going to have to do it pretty quick or I'll have to go 10–7 for gas. . . . You want to just try to run them into there? I'd like to take the Pontiac in there with it, I don't have anything to go on on it other than just normal suspicion. I'd like to at least I.D. the driver and passenger in that"). As the District Court perceptively observed, "[i]t's possibly *[sic]* the very basic reason for stopping them was because Mr. Cooke was about to run out of gas." 5 Record 52.

[10] The Fourth Circuit held that "the length of the detentions effectively transformed them into de facto arrests without bases in probable cause, unreasonable seizures under the Fourth Amendment." 660 F. 2d, at 970. Officer Thrasher himself conceded that Savage was under "custodial arrest" during the entire stop. 4 Record 165. Far from being merely "the brief and narrowly circumscribed intrusions" authorized by the *Terry* line of authority, the detentions here were "in important respects indistinguishable from a traditional arrest," and "any 'exception' that could cover a seizure as intrusive as that in this case would threaten to swallow the general rule that Fourth Amendment seizures are 'reasonable' only if based on probable cause." *Dunaway* v. *New York*, 442 U. S. 200, 212–213 (1979). See also *ante*, at 696–698 (MARSHALL, J., concurring in judgment).

verify or dispel the officer's suspicion in a short period of time," and that the Government bears the burden of demonstrating that it was objectively infeasible to investigate "in a more expeditious way." *Florida* v. *Royer*, 460 U. S., at 500, 505 (opinion of WHITE, J.).[11] The record before us demonstrates that, for at least four reasons, the Government has not carried this burden.

First. Assuming that Savage did not break away from the officers by taking "evasive actions" to "elude" them—in which instance this is not a *Terry* case at all—the Government has not demonstrated why two trained law enforcement officers driving in separate vehicles, both equipped with flashing lights,[12] could not have carried out a stop of a Pontiac and a pickup truck in such a manner as to ensure that both vehicles would be stopped together. Reasonable methods for bringing about the proximate stop of two vehicles readily come to mind; such methods would have been particularly important if, as the Court assumes, both officers knew that only Cooke was capable of carrying out the investigation.

Second. If the officers believed that the suspected marihuana was in Savage's pickup truck, and if only Cooke was capable of investigating for the presence of marihuana, I am at a loss why Cooke did not follow the truck and leave Thrasher with the Pontiac, rather than vice versa.[13]

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[11] As I have previously argued, I do not believe that "the absence of a less intrusive means can make an otherwise unreasonable stop reasonable." *Florida* v. *Royer*, 460 U. S., at 511, n. (concurring in result). See also n. 1, *supra*.

[12] Thrasher was driving a marked police car, and Cooke's unmarked vehicle carried a portable flashing light that could be attached to the dash. See 4 Record 54.

[13] On the stand, the officers disagreed as to which one of them was responsible for this questionable decision. Cooke, supposedly the officer in charge, insisted that "Thrasher told me to get the Pontiac." *Ibid.* Thrasher, on the other hand, maintained that "Cooke said he would stay with the Pontiac." *Id.*, at 145. The Conway Highway Patrol Dispatch Communications transcript demonstrates that Thrasher told Cooke to "[t]ake the Pontiac, I'll get the truck." Defendant's Ex. 1, p. 5.

Third. The Government has offered no plausible explanation why Thrasher, a trained South Carolina highway patrolman, could not have carried out the limited *Terry* investigation of Savage and the pickup truck. Here again, however, the Court makes a bold *de novo* factual finding to the contrary:

> "It was appropriate for Officer Thrasher to hold Savage for the brief period pending Cooke's arrival. Thrasher could not be certain that he was aware of all of the facts that had aroused Cooke's suspicions; and, as a highway patrolman, he lacked Cooke's training and experience in dealing with narcotics investigations." *Ante,* at 687, n. 5.

The record wholly undermines the Court's conclusion. Far from being unaware of what was going on, Thrasher had conversed with Cooke by radio while they were following the vehicles and had fully discussed the various factors that might justify an investigative stop.[14] Cooke sought out Thrasher's "professional opinion" on the situation, and it was *Thrasher* who ultimately made the determination that they properly could stop the vehicles.[15] Thrasher's "professional opinion" was that, based on what Cooke had told him and his own observations, the truck "might be loaded" with marihuana.[16] Once he had stopped Savage, Thrasher not only "held" him, but carried out his own investigation of the situation. He pointed out that the truck had been riding low and asked Savage what was inside. He inspected the exterior and even jumped up on the bumper to test how loaded down the camper might be. 3 Record 87; 4 *id.*, at 150. Moreover, although Cooke certainly had more drug enforcement experience than Thrasher, there is no reason why Thrasher could not have conducted the simple sniffing investigation that Cooke later did: Thrasher, like all South Carolina highway patrolmen, had received basic narcotics detection training and knew exactly what marihuana smells like. 3 *id.*, at 86.[17] He did not even attempt to smell the windows of the camper shell for two reasons: first, that was not his assigned "job"; and second, "[m]y sinuses were stopped up that morning." 4 *id.*, at 164, 178; see also 3 *id.*, at 101.[18] Thrasher's sinuses apparently cleared up several hours later, however, because once the pickup was at the police station he decided, "[j]ust as a matter of curiosity," to "get right up on the window" of the vehicle, and reported decisively that "I smelled some marijuana up around the windows." *Ibid.* I would have thought that, before the Court chose to uphold a lengthy detention of a citizen without probable cause based on the "reasonable" ignorance of the detaining officer, it would have taken the time to get its facts straight.[19]

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[14] See, *e. g., id.,* at 3–4 (transcription of police-band exchanges) (discussing known offloading of marihuana during the night, vehicles' movements, and appearance of vehicles); 4 Record 50 (Cooke "conversed with Mr. Thrasher and attempted to tell him what I had encountered, where I had been"); *id.,* at 52–53, 159–161.

[15] Cooke asked: "What's your professional opinion of the way that truck's riding?" Thrasher responded: "He's loaded. He's got a load in there of something." Cooke replied: "Is that enough reason for you to stop him?" Thrasher answered: "Affirmative . . . Just say the word and I'll . . . ." Defendant's Ex. 1, p. 4. See also 4 Record 52–53.

[16] 3 *id.,* at 87 (Thrasher "suspected that [the truck] may have marihuana in it" because "the camper windows were covered" with quilts and camper appeared to be overloaded); 4 *id.,* at 160–161 (Thrasher knew the truck was suspected of carrying marihuana).

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[17] The Fourth Circuit assumed without deciding that "the odor of raw marijuana may provide probable cause to search a vehicle legitimately stopped." 660 F. 2d, at 971. As JUSTICE MARSHALL notes, "[n]o question is presented [in this case] as to whether odor that creates probable cause also justifies a warrantless search." *Ante*, at 699, n. 12 (concurring in judgment). See *United States* v. *Johns*, 469 U. S. 478, 489 (1985) (BRENNAN, J., dissenting).

[18] After Cooke claimed to have smelled the marijuana, Savage asked for Thrasher's opinion. See 4 Record 177 ("Q. Don't you remember . . . Don Savage saying [to Cooke] you don't smell any marijuana, let's get a second opinion from this officer here, don't you remember that, talking about you, getting your second opinion? A. Yes, sir, I believe he might have"). Thrasher could not recall why he did not follow through on the request. *Id.*, at 177–178.

Finally. The record strongly suggests that the delay may have been attributable in large measure to the poor investigative coordination and botched communications on the part of the DEA. Drug enforcement agents were swarming throughout the immediate area on the morning that Savage and Sharpe were detained, conducting numerous roadblocks and "profile stops" of campers and recreational vehicles similar to Savage's. See n. 9, *supra.* Even accepting the Court's dubious premise that a highway patrolman is somehow incapable of carrying out a simple investigative stop, it is clear that Cooke had followed Sharpe and Savage for over 30 minutes and, knowing that a multiple-vehicle stop was in the offing, should have obtained assistance from other DEA agents. This was, in fact, precisely what he attempted to do. He repeatedly tried to contact the area DEA headquarters but complained over his police radio that "I can't raise anybody else right now." Defendant's Ex. 1, p. 3 (police-band transcription). He asked the local police dispatcher to telephone the DEA office to "ask them if anybody there has any contact with me on my DEA frequency." *Id.*, at 4. The dispatcher reported that the line was busy; local police units had to be sent out to headquarters "to tell these people to get off the telephone." *Id.*, at 6. Once the units arrived, it was learned that "[t]here's no one there. They're all down at the Mar Vista Motel." *Ibid.* Additional units had to be sent to the motel to "get those people out of the sack." *Ibid.* Agents apparently were eventually located at the motel and at Don's Pancake House, *ibid.*, for by the time that Cooke returned to the Pontiac to complete the arrests there were several other DEA agents waiting to assist him, 4 Record 171–172. In the meantime, of course, Cooke had had to request Thrasher as a local backup.

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[19] The Court has responded by insisting that Thrasher "could not be certain that he was aware" of all the facts and therefore was justified in detaining Savage indefinitely. *Ante,* at 687, n. 5. The Court has not pointed to anything that would support this bald *de novo* finding, which is squarely contradicted by the record. See *supra,* at 713–714. In addition, the Court's reasoning flies directly in the face of the Fourth Amendment, which requires the authorities to ground their conduct on what is known at the time of their actions rather than on what might subsequently turn up. See, *e. g., Henry* v. *United States,* 361 U. S. 98, 103 (1959) ("An arrest is not justified by what the subsequent search discloses"); *Johnson* v. *United States,* 333 U. S. 10, 17 (1948). The Court's unprecedented suggestion to the contrary threatens to "obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law." *Ibid.* It is enough here that Thrasher possessed whatever reasonable suspicion Cooke did and was fully in the position to conduct the sniffing investigation that Cooke later undertook.

Far from demonstrating that these investigative stops were carried out in the most "expeditious way" using all "reasonably available" investigative methods, *Florida* v. *Royer*, 460 U. S., at 500, 505 (opinion of WHITE, J.), the record in this case therefore strongly suggests custodial detentions more accurately characterized as resulting from hopelessly bungled communications and from Thrasher's unwillingness to tread on Cooke's investigative turf. I do not mean to suggest that Cooke and Thrasher bore the entire blame for these delays; it was not Cooke's fault that his DEA backups apparently were sleeping or eating breakfast rather than monitoring their radios for his calls, and Thrasher might well have felt that it was not his place to carry out an investigation he apparently was fully capable of conducting. But constitutional rights should not so easily be balanced away simply because the individual officers may have subjectively been acting in good faith, especially where an objective evaluation of the facts suggests an unnecessarily intrusive exercise of police power.[20]

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[20] In response to this dissent, the Court offers several justifications for its failure to consult the record in making its *de novo* factual determina-

B

We must remember the Fourth Amendment values at stake here. The Framers understood that "[u]ncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government," and that "[a]mong deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart." *Brinegar* v. *United States*, 338 U. S. 160, 180 (1949) (Jackson, J., dissenting). The Framers accordingly provided that individuals shall be arrested and detained only on probable cause—a standard with "roots that are deep in our history," *Henry* v. *United States*, 361 U. S., at 100, and grounded on "a practical, nontechnical conception affording the best compromise that has been found for accommodating" the "often opposing" interests of effective law enforcement and individual rights, *Brinegar* v. *United States*, *supra*, at 176. By requiring that arrests be made only on probable cause, the Framers sought to preclude custodial

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tions. First, the Court asserts that judges "should not indulge in unrealistic second-guessing" of police conduct. *Ante*, at 686. There is nothing "unrealistic" about requiring police officers to pursue the "least intrusive means reasonably available" when detaining citizens on less than probable cause, *Florida* v. *Royer*, 460 U. S., at 500 (opinion of White, J.), and it is the *duty* of courts in every Fourth Amendment case to determine whether police conduct satisfied constitutional standards. Moreover, the public will understandably be perplexed why the Court ignores the record and refuses to engage in "second-guessing" where police conduct is challenged while it simultaneously engages in second-guessing of a defendant's conduct where necessary to ensure a verdict for the Government.

In addition, the Court attempts to slip into a footnote the astonishing assertion that *even if its textual discussion of Savage's actions is completely untrue*, this "would not alter our analysis or our conclusion." *Ante*, at 688, n. 6 (emphasis added). The Court contends that, "*whether innocent* or purposeful," *Savage's* conduct "made . . . necessary" the length of these detentions. *Ibid.* (emphasis added). If the authorities did not reasonably carry out the stops, however, and if Savage's continued driving was "innocent" conduct, *ibid.*, it is logically and constitutionally intolerable to hold that Savage waived important Fourth Amendment rights because the events were his "innocent" fault.

detentions resulting solely from "common rumor or report, suspicion, or even 'strong reason to suspect.'" *Henry* v. *United States*, *supra*, at 101. *Terry* and its progeny depart from the probable-cause safeguard, but only because the sorts of limited intrusions wrought by such encounters fall "far short of the kind of intrusion associated with an arrest." *Dunaway* v. *New York*, 442 U. S. 200, 212 (1979). Detaining officers therefore may *briefly* question individuals and "ask them to explain suspicious circumstances, but any *further detention* or search must be based on consent or probable cause." *United States* v. *Brignoni-Ponce*, 422 U. S. 873, 882 (1975) (emphasis added).

Terry's brevity requirement thus functions as an important constitutional safeguard that prevents an investigative stop from being transformed into a custodial detention merely because "the law enforcement purposes to be served by the stop" are considered important. *Ante*, at 685. Absent a rigorously enforced brevity requirement, the *Terry* rationale "would threaten to swallow the general rule that Fourth Amendment seizures are 'reasonable' only if based on probable cause." *Dunaway* v. *New York*, *supra*, at 212–213. As JUSTICE MARSHALL cogently discusses today, the brevity requirement also serves to compel law enforcement agencies to "structure their *Terry* encounters" by employing the resources and methods necessary to "minimize the intrusions worked by these encounters." *Ante*, at 693 (concurring in judgment). Similarly, *Royer*'s requirement that the prosecution demonstrate that the *Terry* stop was carried out in the most "expeditious way" using all "reasonably available" investigative methods, 460 U. S., at 500, 505 (opinion of WHITE, J.), operates to ensure that law enforcement agencies commit the manpower, training, and resources necessary to guarantee that investigative detentions are carried out in the least intrusive manner possible. Some may protest that such requirements impede unduly on law enforcement, but surely these are reasonable tradeoffs for the authority to seize and detain citizens on less than probable cause. And while it may be tempting to relax these requirements when a defendant is believed to be guilty, the standards we prescribe for the guilty define the authority of the police in detaining the innocent as well. Cf. *Brinegar* v. *United States*, *supra*, at 181 (Jackson, J., dissenting) ("[A] search against Brinegar's car must be regarded as a search of the car of Everyman").

In this connection, I am particularly disturbed by the Court's suggestion that it might be constitutionally reasonable for a highway patrolman to hold a motorist on *Terry* suspicion pending the arrival of an officer with more "training and experience." *Ante*, at 687, n. 5. The Court is of course correct in emphasizing that Cooke was much more expert at drug detection than Thrasher. I can imagine a great many roadside stop situations in which it might make good police sense for the detaining officer to hold the motorist indefinitely without probable cause so that the officer could have an expert interrogator drive out from the city to conduct the "brief" questioning authorized by *Terry*, or so that his more experienced sergeant could be summoned to render a second opinion, or so that a trained narcotics dog owned by the adjacent county could be driven out to sniff around the windows. I can also imagine circumstances where, given the limited number of patrol cars in a community, an officer might prefer to handcuff a person stopped for investigative questioning to a lamppost while the officer responded to an emergency call. All of these actions might be preferable from a law enforcement standpoint. The Framers did not enact the Fourth Amendment to further the investigative powers of the authorities, however, but to curtail them: *Terry*'s exception to the probable-cause safeguard must not be expanded to the point where the constitutionality of a citizen's detention turns only on whether the individual officers were coping as best they could given inadequate training, marginal resources, negligent supervision, or botched communications.

Our precedents require more—the demonstration by the Government that it was infeasible to conduct the training, ensure the smooth communications, and commit the sort of resources that would have minimized the intrusions. *United States* v. *Place*, 462 U. S., at 709–710; *Florida* v. *Royer*, 460 U. S., at 505–506 (opinion of WHITE, J.).

The Court today has evaded these requirements, failed even to acknowledge the evidence of bungling, miscommunication, and reasonable investigative alternatives, and pronounced simply that the individual officers "acted diligently." *Ante*, at 688. Thus the Court has moved a step or two further in what appears to be "an emerging tendency on the part of the Court to convert the *Terry* decision into a general statement that the Fourth Amendment requires only that any seizure be reasonable," *United States* v. *Place*, *supra*, at 721 (BLACKMUN, J., concurring in judgment)—a balancing process in which the judicial thumb apparently will be planted firmly on the law enforcement side of the scales.[21]

IV

Justice Douglas, the lone dissenter in *Terry*, warned that "[t]here have been powerful hydraulic pressures throughout our history that bear heavily on the Court to water down constitutional guarantees and give the police the upper hand." 392 U. S., at 39. Those hydraulic pressures are readily apparent in the outcome of this case. The Court has eschewed narrow grounds of decision so as to expand the bounds of *Terry;* engaged in questionable *de novo* factfinding in violation of its proper mission; either ignored or misconstrued numerous factors in the record that call into question the reasonableness of these custodial detentions; and evaded the requirements of squarely governing precedents. This breed of decisionmaking breaches faith with our high constitutional duty "to prevent wholesale intrusions upon the personal security of our citizenry." *Davis* v. *Mississippi*, 394 U. S. 721, 726 (1969). I dissent.

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[21] Cf. *United States* v. *Leon*, 468 U. S. 897, 929 (1984) (BRENNAN, J., dissenting) (noting Court's increasing resort to cost/benefit analyses "where the 'costs' of excluding illegally obtained evidence loom to exaggerated heights and where the 'benefits' of such exclusion are made to disappear with a mere wave of the hand").

JUSTICE STEVENS, dissenting.

Both respondents are fugitives.[1] Their status raises a procedural question that is of more significance than the merits of the somewhat fact-bound questions that the Government's petition for certiorari presented.[2] The procedural question is important because escapes by persons engaged in the lucrative business of smuggling narcotics are apparently not uncommon,[3] and because the fugitive status of the litigants may have an impact on this Court's disposition of the case.

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[1] The Government's petition for the grant of a writ of certiorari was filed on September 27, 1983; it was granted on June 18, 1984. On May 11, 1984, respondent Sharpe's counsel wrote a letter to the Court. It stated that, "as of this date, Mr. Sharpe is in fugitive status as to charges in the Northern District of Georgia and the State of North Carolina." See Letter of Mark J. Kadish to Alexander Stevas, Clerk of the United States Supreme Court (May 11, 1984). Subsequently, on July 11, 1984, Judge Sol Blatt, Jr., of the United States District Court for the District of South Carolina entered two orders forfeiting the bonds of both respondents. See Motion to Proceed in Forma Pauperis of William Harris Sharpe and Donald Davis Savage, Exhibit B. The Solicitor General states that the United States Attorney's Office has advised the Department of Justice that, "to the best of its knowledge, respondents remain fugitives." Reply Brief for United States 2.

[2] The Government's petition posed the following questions:

"1. Whether law enforcement officers may temporarily detain an individual reasonably suspected of criminal activity for the period—brief, but exceeding a few minutes—reasonably necessary to pursue a circumscribed investigation of the suspected criminal activity.

"2. Whether, assuming that the initial phase of either respondent's detention was unduly extended, the illegality mandates suppression of a large shipment of marijuana which, because of its distinct odor, was discovered immediately thereafter in respondent Savage's vehicle." Pet. for Cert. I.

Cf. *Florida* v. *Meyers*, 466 U. S. 380, 385 (1984) *(per curiam)* (STEVENS, J., dissenting) (the Court "should focus [its] attention on methods of using [its] scarce resources wisely rather than laying another course of bricks in the building of a federal judicial bureaucracy").

If a defendant escapes, and remains at large while his appeal is pending, the appeal will normally be dismissed.[4] Over a century ago, in *Smith* v. *United States*, 94 U. S. 97 (1876), the Court explained the rationale for this type of disposition:

> "It is clearly within our discretion to refuse to hear a criminal case in error, unless the convicted party, suing out the writ, is where he can be made to respond to any judgment we may render. In this case it is admitted that the plaintiff in error has escaped, and is not within the control of the court below, either actually, by being in custody, or constructively, by being out on bail. If we affirm the judgment, he is not likely to appear to submit to his sentence. If we reverse it and order a new trial, he will appear or not, as he may consider most for his interest. Under such circumstances, we are not inclined to hear and decide what may prove to be only a moot case."[5]

Almost a century later, in *Estelle* v. *Dorrough*, 420 U. S. 534 (1975) *(per curiam)*, we further noted that "[d]isposition by dismissal of pending appeals of escaped prisoners is a longstanding and established principle of American law," and that "[t]his Court itself has long followed the practice of declining to review the convictions of escaped criminal defendants."[6] In the case now before the Court, the respondents did not become fugitives until after they had prevailed in the Court of Appeals and until after the Government had sought review in this Court.[7] The timing of the escape, however, plainly does not affect this Court's power to base its disposition of the case on the fact that respondents have fled. Nor, in my opinion, at least in a case in which there is no dispute about the fugitives' guilt, should there be any difference in the ultimate disposition of the appeal.

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[3] See, *e. g.*, *Florida* v. *Rodriguez*, 469 U. S. 1, 2–3 (1984) *(per curiam)*; *United States* v. *Holmes*, 680 F. 2d 1372, 1373 (CA11 1982), cert. denied, 460 U. S. 1015 (1983); *United States* v. *Wood*, 550 F. 2d 435, 437–438 (CA9 1976); *United States* v. *Sperling*, 506 F. 2d 1323, 1345, n. 33 (CA2 1974), cert. denied, 420 U. S. 962 (1975).

[4] *Molinaro* v. *New Jersey*, 396 U.S. 365, 365–366 (1970) *(per curiam)*.

[5] 94 U. S., at 97.

The record establishes that the respondents were apprehended while engaged in a serious and flagrant violation of law. Their appeal to the Court of Appeals was based on a claim that the evidence of their guilt was obtained in an unlawful search; such a claim, even if meritorious, establishes neither a lack of culpability nor any fundamental unfairness in the trial process.[8] It is therefore entirely appropriate to conclude that, as fugitives, these litigants should not be accorded standing to advance their claim on appeal.[9]

As would have been true if they had escaped while their appeal was pending before the Court of Appeals, neither of these litigants "is where he can be made to respond to any judgment we may render."[10] In my judgment, the Court of Appeals' conclusion that respondents' appeal to it was meritorious should make no difference in the ultimate outcome. Every application of the *Smith* rule necessarily assumes that an appeal may be meritorious. Moreover, the Court of Appeals' ruling in respondents' favor does not preclude the possibility that this Court will disagree. In short, for the purpose of deciding whether the *Smith* rule applies, I believe the merits of the appeal should be entirely disregarded.[11]

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[6] 420 U. S., at 537. That case also discussed an opinion issued over five years earlier, *Molinaro* v. *New Jersey*, *supra*. Regarding that opinion, we wrote:

"Thus, in *Molinaro* v. *New Jersey*, 396 U. S. 365 (1970), we dismissed the appeal of an escaped criminal defendant, stating that no persuasive reason exists to adjudicate the merits of such a case and that an escape 'disentitles the defendant to call upon the resources of the Court for determination of his claims.' *Id.*, at 366." 420 U. S., at 537.

See also *Eisler* v. *United States*, 338 U. S. 189 *(per curiam)*, and 338 U. S. 883 (1949); *Bonahan* v. *Nebraska*, 125 U. S. 692 (1887); *Smith* v. *United States*, 94 U. S. 97 (1876); cf. *Allen* v. *Rose*, 419 U. S. 1080 (1974).

[7] See n. 1, *supra*.

[8] Cf. *Stone* v. *Powell*, 428 U. S. 465 (1976).

[9] Cf. *Walder* v. *United States*, 347 U. S. 62, 65 (1954).

The Court states, *ante*, at 681, n. 2, that because a "reversal of the Court of Appeals' judgment may lead to the reinstatement of respondents' convictions, respondents' fugitive status does not render this case moot." I agree that the case is not technically moot.[12] An escape, however, may compromise the adversary character of the litigation. The lawyer for the escapee presumably will have lost contact with his client; his desire to vindicate a faithless client may be less than zealous; and, as noted, the Court cannot have its normal control over one of the parties to the case before it. The risk that the adversary process will not function effectively counsels against deciding the merits of a case of this kind.[13]

The correct disposition of this case, I believe, is to treat it as though the respondents' escape had mooted the appeal. If we vacate the judgment of the Court of Appeals, and if we direct that the appeal from the judgment of the District

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[10] *Smith* v. *United States*, 94 U. S., at 97.

[11] The Government disagrees. It proposes that the Court reverse the judgment of the Court of Appeals if we disagree on the merits; however, if we agree with the Court of Appeals on the merits, the Government states that we "should vacate the judgment of the court of appeals and remand the case to that court with directions to dismiss the appeals with prejudice." Reply Brief for United States 6–7. The Court has not expressly endorsed the Government's "heads I win, tails you lose" position.

[12] See *Molinaro* v. *New Jersey*, 396 U. S., at 366.

[13] See n. 11, *supra*.

Court be dismissed, the consequences would be the same as if the escape had occurred in advance of the Court of Appeals' decision. Moreover, by vacating that court's judgment, the Government's interest in eliminating the precedent that it has challenged in its certiorari petition would be vindicated.[14] Finally, such a disposition would make it unnecessary for this Court to decide the constitutional question that is presented.[15] That, for me, is a matter of paramount importance.[16]

There is one adverse consequence of the disposition I propose. It would deprive the Court of the opportunity to write an opinion in a Fourth Amendment case. The summary disposition of this case would not serve the interest of providing additional guidance to the law enforcement community. But regarding that interest as paramount would support the wholesale adoption of a practice of rendering advisory opinions at the request of the Executive—a practice the Court abjured at the beginning of our history.[17] We have,

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[14] Cf. *United States* v. *Munsingwear, Inc.*, 340 U. S. 36, 39–40 (1950).

[15] *Rescue Army* v. *Municipal Court of Los Angeles*, 331 U. S. 549, 568–574 (1947); *Spector Motor Service, Inc.* v. *McLaughlin*, 323 U. S. 101, 105 (1944) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable"); *Ashwander* v. *TVA*, 297 U. S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of"); *Burton* v. *United States*, 196 U. S. 283, 295 (1905) ("It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case").

[16] Characteristically, it is a matter the Court simply ignores. See *ante*, at 681–682, n. 2. In *Florida* v. *Rodriguez*, 469 U. S. 1 (1984) *(per curiam)*, on which the Court relies, neither the Court nor the litigants based any argument on the respondent's fugitive status. Moreover, it would have been inappropriate for this Court to vacate the judgment of the Florida court because we have no supervisory power over state courts. Once again, however, the Court has thus overlooked the "important differences between cases that come to us from state tribunals and those that arise in the federal system." *Id.*, at 7 (STEVENS, J., dissenting); see also *Secretary of State of Maryland* v. *Joseph H. Munson Co.*, 467 U. S. 947, 972 (1984) (STEVENS, J., concurring). The Court's reliance on *United States* v. *Campos-Serrano*, 404 U. S. 293, 294–295, n. 2 (1971), is also misplaced because the point Justice Stewart made for the Court was that the respondent in that case was not a fugitive. In making that point, Justice Stewart implicitly assumed that the doctrine of *Smith* v. *United States*, *supra*, would apply to a case in which the fugitive was the respondent as well as to one in which the fugitive was the petitioner.

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[17] See *Hayburn's Case*, 2 Dall. 409 (1792). Following that decision, this Court made clear, after a series of letters, its constitutional practice of not rendering advisory opinions. The correspondences began on July 18, 1793, when Thomas Jefferson, Secretary of State, wrote the following letter to Chief Justice John Jay and Associate Justices:

"GENTLEMEN:

"The war which has taken place among the powers of Europe produces frequent transactions within our ports and limits, on which questions arise of considerable difficulty, and of greater importance to the peace of the United States. Their questions depend for their solution on the construction of our treaties, on the laws of nature and nations, and on the laws of the land, and are often presented under circumstances *which do not give a cognisance of them to the tribunals of the country.* Yet their decision is so little analogous to the ordinary functions of the executive, as to occasion much embarrassment and difficulty to them. The President therefore would be much relieved if he found himself free to refer questions of this description to the opinions of the judges of the Supreme Court of the United States, whose knowledge of the subject would secure us against errors dangerous to the peace of the United States, and their authority insure the respect of all parties. He has therefore asked the attendance of such of the judges as could be collected in time for the occasion, to know, in the first place, their opinion, whether the public may, with propriety, be availed of their *advice on these questions?* And if they may, to present, for their advice, the abstract questions which have already occurred, or may soon occur, from which they will themselves strike out such as any circumstances might, in their opinion, forbid them to pronounce on. I have the honour to be with sentiments of the most perfect respect, gentlemen,

"Your most obedient and humble servant,

"THOS. JEFFERSON"

3 Correspondence and Public Papers of John Jay 486–487 (H. Johnston ed. 1891) (emphasis in original).

Attached with the letter, on behalf of President Washington, were 29 questions. See 33 Writings of George Washington 15–19 (J. Fitzpatrick instead, opted for a policy of judicial restraint—of studiously avoiding the unnecessary adjudication of constitutional questions. The correct implementation of that policy, I submit,

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ed. 1940). Two days later, Chief Justice Jay and the Associate Justices penned the following to President Washington:

"SIR:

"We have taken into consideration the letter written to us, by your direction, on the 18th inst., by the Secretary of State. The question, 'whether the public may, with propriety, be availed of the advice of the judges on the questions alluded to,' appears to us to be of much difficulty as well as importance. As it affects the judicial department, we feel a reluctance to decide it without the advice and participation of our absent brethen.

"The occasion which induced our being convened is doubtless urgent; of the degree of that urgency we cannot judge, and consequently cannot propose that the answer to this question be postponed until the sitting of the Supreme Court. We are not only disposed, but desirous, to promote the welfare of our country in every way that may consist with our official duties. We are pleased, sir, with every opportunity of manifesting our respect for you, and are solicitous to do whatever may be in our power to render your administration as easy and agreeable to yourself as it is to our country. If circumstances should forbid further delay, we will immediately resume the consideration of the question, and decide it.

"We have the honour to be, with perfect respect, your most obedient and most humble servants." 3 Correspondence and Public Papers of John Jay 487–488 (Johnston ed. 1891).

President Washington promptly returned a reply:

"Gentlemen: The circumstances, which had induced me to ask your counsel on certain legal questions interesting to the public, exist now as they did then; but I by no means press a decision, whereon you wish the advice and participation of your absent brethen. Whenever, therefore, their presence shall enable you to give it with more satisfaction to yourselves, I shall accept it with pleasure. With sentiments of high respect, I am, &c." 33 Writings of George Washington 28 (J. Fitzpatrick ed. 1940).

Finally, Chief Justice Jay and the Associate Justices returned their response:

"SIR:

"We have considered the previous question stated in a letter written by your direction to us by the Secretary of State on the 18th of last month, [regarding] the lines of separation drawn by the Constitution between the three departments of the government. These being in certain respects requires that we predicate the disposition of this case on the respondents' fugitive status.

Accordingly, I respectfully dissent.

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checks upon each other, and our being judges of a court of the last resort, are considerations which afford strong arguments against the propriety of our extra-judicially deciding the questions alluded to, especially as the power given by the Constitution to the President, of calling on the heads of departments for opinions, seems to have been *purposely* as well as expressly united to the *executive* departments.

"We exceedingly regret every event that may cause embarrassment to your administration, but we derive consolation from the reflection that your judgment will discern what is right, and that your usual prudence, decision, and firmness will surmount every obstacle to the preservation of the rights, peace, and dignity of the United States.

"We have the honour to be, with perfect respect, sir, your most obedient and most humble servants." 3 Correspondence and Public Papers of John Jay 488–489 (Johnston ed. 1891) (emphasis in original).

FLORIDA POWER & LIGHT CO. *v.* LORION, DBA CENTER FOR NUCLEAR RESPONSIBILITY, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83–703. Argued October 29, 1984—Decided March 20, 1985*

Under 28 U. S. C. § 2342(4), a provision of the Hobbs Act, the courts of appeals have exclusive jurisdiction over petitions for review of "all final orders" of the Nuclear Regulatory Commission "made reviewable by" 42 U. S. C. § 2239. Section 2239(b), in turn, provides that the Hobbs Act governs review of "[a]ny final order entered in any proceeding of the kind specified in subsection (a) of this section." Subsection (a)(1) provides that "[i]n any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license . . . the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding." Respondent Lorion (hereafter respondent) wrote a detailed letter to the Commission expressing fears about potential safety threats at Florida Power & Light Co.'s nuclear reactor near her home, and urging the Commission to suspend the reactor's operating license. The Commission treated the letter as a citizen petition, under its rules, requesting the institution of administrative proceedings to suspend the license. After the Commission ultimately denied the request, respondent petitioned the Court of Appeals for review. The court decided *sua sponte* that it lacked initial subject-matter jurisdiction to review the Commission's denial of respondent's citizen petition, concluding that such a denial was not an order in a "proceeding" within the meaning of § 2239(a)(1).

Held: Section 2239 vests in the courts of appeals initial subject-matter jurisdiction over Commission orders denying citizen petitions made pursuant to Commission rules. Pp. 734–746.

(a) The language of § 2239 is ambiguous because subsection (b) refers to "proceeding[s] of the kind specified in subsection (a)," but the pertinent sentence in subsection (a)(1) sets forth both the scope of Commission licensing proceedings and a hearing requirement for such proceedings. Thus § 2239 may be read to authorize initial court of appeals

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*Together with No. 83–1031, *United States Nuclear Regulatory Commission et al.* v. *Lorion, dba Center for Nuclear Responsibility, et al.*, also on certiorari to the same court.

review either by reference to whether a hearing was held pursuant to the hearing requirement (as the Court of Appeals did here), or by reference to the subject matter of the agency action, that is, whether the order was issued in a licensing proceeding. Pp. 735–737.

(b) Relevant evidence of congressional intent in the legislative history supports the interpretation that Congress intended to provide for initial court of appeals review of all final orders in licensing proceedings whether or not a hearing before the Commission occurred or could have occurred. Pp. 737–740.

(c) Whether subject-matter jurisdiction over denials of citizens petitions properly lies in the district courts or the courts of appeals must also be considered in light of the basic congressional choice of Hobbs Act review in § 2239(b). The Hobbs Act specifically contemplates initial courts of appeals review of agency orders resulting from proceedings in which no hearing took place. Pp. 740–741.

(d) Adopting a rule that would vest the courts of appeals with initial subject-matter jurisdiction of challenges to Commission denials of citizen petitions only when an administrative hearing occurred or could have occurred would result in irrational consequences that could not be squared with general principles respecting judicial review of agency action. Pp. 741–745.

229 U. S. App. D. C. 440, 712 F. 2d 1472, reversed and remanded.

BRENNAN, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, MARSHALL, BLACKMUN, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. STEVENS, J., filed a dissenting opinion, *post*, p. 746.

Charles A. Rothfeld argued the cause *pro hac vice* for petitioners in No. 83–1031. On the briefs were *Solicitor General Lee, Deputy Solicitor General Claiborne, John H. Garvey, Dirk D. Snel, John A. Bryson, Herzel H. E. Plaine,* and *E. Leo Slaggie*. *Harold F. Reis* argued the cause for petitioner in No. 83–703. With him on the briefs was *Norman A. Coll*.

Martin H. Hodder argued the cause for respondent Lorion. With him on the brief was *Terence J. Anderson*.†

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†*Joseph B. Knotts, Jr.*, and *Linda L. Hodge* filed a brief for the Atomic Industrial Forum, Inc., as *amicus curiae* urging reversal.

JUSTICE BRENNAN delivered the opinion of the Court.

These cases require us to decide whether 28 U. S. C. § 2342(4) and 42 U. S. C. § 2239 grant the federal courts of appeals exclusive subject-matter jurisdiction initially to review decisions of the Nuclear Regulatory Commission to deny citizen petitions requesting that the Commission "institute a proceeding . . . to modify, suspend or revoke a license . . . ." 10 CFR § 2.206(a) (1984).

I

Respondent Joette Lorion, on behalf of the Center for Nuclear Responsibility, wrote the Nuclear Regulatory Commission on September 11, 1981, to express fears about potential safety threats at petitioner Florida Power and Light Company's Turkey Point nuclear reactor near her home outside Miami, Florida. Her detailed letter urged the Commission to suspend Turkey Point's operating license[1] and specified several reasons for such action.[2] The Commission treated Lorion's letter as a citizen petition for enforcement action pursuant to the authority of § 2.206 of the Commission's rules of practice. This rule provides:

> "Any person may file a request for the Director of Nuclear Reactor Regulation . . . to institute a proceeding pursuant to [10 CFR] § 2.202 to modify, suspend or revoke a license, or for such other action as may be proper. . . . The requests shall specify the action requested

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[1] Sections 181–189 of the Atomic Energy Act of 1954, 42 U. S. C. §§ 2231–2239, set forth a detailed and comprehensive licensing scheme to govern private construction and operation of nuclear power facilities.

[2] Lorion claimed that (1) the reactor's steam generator tubes had not been inspected; (2) the plugging and consequent deactivation of as many as 25% of the steam generator tubes overburdened the remaining functional tubes and therefore posed a risk of leakage in those tubes; and (3) the steel reactor pressure vessel had become dangerously brittle and therefore might not withstand the thermal shock that would accompany any emergency cooldown of the reactor core. App. 6–8.

> and set forth the facts that constitute the basis for the request." 10 CFR § 2.206(a) (1984).

This rule also requires the Director of Nuclear Reactor Regulation, within a reasonable time after receiving such a request, either to institute the requested proceeding,[3] or to provide a written explanation of the decision to deny the request. § 2.206(b). The Commission interprets § 2.206 as requiring issuance of an order to show cause when a citizen petition raises "substantial health or safety issues." *Consolidated Edison Co. of New York*, 2 N. R. C. 173, 174 (1975).

In these cases, the Director decided not to take the action Lorion had requested. His written explanation—based on a 547-page record compiled primarily from existing Commission materials—responded to each of Lorion's points.[4] See *In re Florida Power & Light Co. (Turkey Point Plant, Unit 4)*, 14 N. R. C. 1078 (1981). Lorion unsuccessfully sought review by the Commission of the Director's denial of the § 2.206 request and then petitioned the Court of Appeals for the District of Columbia Circuit for review. Before that court, Lorion argued that the Director's denial of the § 2.206 request was arbitrary and capricious pursuant to the Administrative Procedure Act (APA), 5 U. S. C. § 706(2)(A).

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[3] The Director of Nuclear Reactor Regulation institutes the requested proceeding by serving an order to show cause upon the licensee. According to Commission regulations this order must inform the licensee of, *inter alia*, the allegations against it, its right to respond, and its right to a hearing. 10 CFR § 2.202 (1984).

[4] The claimed lack of inspection was found to have been mooted by a Commission staff inspection of the steam generator tubes on October 19, 1981, approximately one month after Lorion's letter. The risk of leaking steam generator tubes was found not to pose a serious safety hazard. In any event, the chances of such leakage were found to be remote and the tubes were then being subjected to close monitoring by Commission staff. The risk of vessel cracking as a result of thermal shock was similarly found to be negligible. See *In re Florida Power & Light Co. (Turkey Point Plant, Unit 4)*, 14 N. R. C. 1078 (1981).

Lorion also claimed that the Commission improperly denied her the statutory right to a full public hearing on the § 2.206 request. The Commission defended the substantive integrity of its decision and argued that Lorion had no right to a hearing.

Declining to reach the merits of this dispute, the Court of Appeals decided *sua sponte* that it lacked initial subject-matter jurisdiction over Lorion's challenge to the denial of the § 2.206 petition. This result was based on the court's reading of the three statutory provisions that define the initial jurisdiction of the federal courts of appeals over Commission decisions. Under 28 U. S. C. § 2342(4), a provision of the Administrative Orders Review Act (commonly known and referred to herein as the Hobbs Act) the courts of appeals have exclusive jurisdiction over petitions seeking review of "all final orders of the Atomic Energy Commission [now the Nuclear Regulatory Commission] made reviewable by section 2239 of title 42." Title 42 U. S. C. § 2239(b) provides that the Hobbs Act governs review of "[a]ny final order entered in any proceeding of the kind specified in subsection (a) [of section 2239]." Subsection (a) proceedings are those "for the granting, suspending, revoking, or amending of any license." 42 U. S. C. § 2239(a)(1). The Court of Appeals concluded that the Commission's denial of Lorion's § 2.206 petition was not an order entered in a "proceeding for the granting, suspending, revoking, or amending of any license" within the meaning of 42 U. S. C. § 2239(a) and therefore dismissed Lorion's petition for review for lack of subject-matter jurisdiction. 229 U. S. App. D. C. 440, 712 F. 2d 1472 (1983).

The court's decision turned on its interpretation of the interrelation between the review and hearing provisions of § 2239. Section 2239(a)(1) provides that "[i]n any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license . . . the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding." On the basis of this statutory hearing requirement, the court reasoned that Commission action was a § 2239(a)(1) "proceeding" only if an interested person could obtain a hearing. Because the Court of Appeals for the District of Columbia Circuit had earlier held that a § 2.206 petitioner had no right to a hearing, see *Porter County Chapter of the Izaak Walton League of America, Inc.* v. *NRC*, 196 U. S. App. D. C. 456, 462, and n. 16, 606 F. 2d 1363, 1369, and n. 16 (1979), and because the Commission urged in its brief that "'[u]nless and until granted [Lorion's § 2.206 request] is not a "proceeding" where the requester has any right to present evidence,'" 229 U. S. App. D. C., at 446, 712 F. 2d, at 1478 (citation omitted), the Court of Appeals held that the denial of Lorion's § 2.206 request was not an order entered in a "proceeding" within the meaning of § 2239(a). Section 2239(b) was therefore found not to authorize initial court of appeals review of the order, and the court declined to hear the case.[5] This holding arguably departed from precedent within the Circuit,[6] and in any event created a direct conflict with the holdings of two other Circuits.[7] We granted certiorari to resolve the conflict. 466 U. S. 903 (1984). We reverse.

II

The issue before us is whether the Commission's denial of a § 2.206 request should be considered a final order initially reviewable exclusively in the court of appeals pursuant to 42

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[5] The Court of Appeals transferred the case to the District Court pursuant to 28 U. S. C. § 1631. See App. to Pet. for Cert. in No. 83–703, p. 15. In its opinion, the Court of Appeals had suggested that the District Court likely had subject-matter jurisdiction under either 28 U. S. C. § 1331 or 28 U. S. C. § 1337. See 229 U. S. App. D. C., at 447, 712 F. 2d, at 1479.

[6] See *Seacoast Anti-pollution League of New Hampshire* v. *NRC*, 223 U. S. App. D. C. 288, 291, 690 F. 2d 1025, 1028 (1982).

[7] See *County of Rockland* v. *NRC*, 709 F. 2d 766, 774 (CA2), cert. denied, 464 U. S. 993 (1983); *Rockford County League of Women Voters* v. *NRC*, 679 F. 2d 1218, 1219–1221 (CA7 1982).

U. S. C. § 2239(b) and 28 U. S. C. § 2342(4).[8] This issue requires us to decide whether such an order is issued in a "proceeding . . . for the granting, suspending, revoking, or amending of any license." 42 U. S. C. § 2239(a)(1). Enacting § 2239 in 1954, Congress did not focus specifically on this question; the Commission did not establish the § 2.206 citizen petition procedure until 20 years later. See 39 Fed. Reg. 12353 (1974).[9] Our task therefore is to decide whether Commission denials of § 2.206 petitions are final orders of the kind Congress intended to be reviewed initially in the court of appeals pursuant to § 2239(b).

A

We begin, as did the Court of Appeals, with the language of the statute. See *Reiter* v. *Sonotone Corp.*, 442 U. S. 330, 337 (1979). The crucial statutory language in subsection (b) of § 2239 is: "Any final order entered in any proceeding of the kind specified in subsection (a) of this section shall be subject to judicial review in the manner prescribed in [the Hobbs Act, 28 U. S. C. § 2341 *et seq.*]." Though subsection (b) would seem generally to locate review of licensing proceedings in the courts of appeals pursuant to 28 U. S. C. § 2342(4), the cross-reference to "proceeding[s] of the kind specified in subsection (a)" is problematic. In a vexing semantic conjunction, the sentence in subsection (a) to which subsection (b) refers sets forth both the scope of Commission licensing proceedings and the hearing requirement for such proceedings. See 42 U. S. C. § 2239(a)(1) ("In any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license . . . the Commission shall grant a hearing to any person whose interest may be affected by the proceeding").

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[8] In these cases we address only the question whether initial *subject-matter jurisdiction* is properly located in the court of appeals or the district court. That is the only question on which we granted certiorari, and it is the only question that the parties have briefed and argued before this Court. We express no views on the merits of respondent Lorion's challenge to the Commission's denial of her citizen petition made under the authority of 10 CFR § 2.206 (1984).

In addition, no party has argued that under the APA, 5 U. S. C. § 701(a)(2), Commission denials of § 2.206 petitions are instances of presumptively unreviewable "agency action . . . committed to agency discretion by law" because they involve the exercise of enforcement discretion. See *Heckler* v. *Chaney*, *post*, at 828–835. Because the question has been neither briefed nor argued and is unnecessary to the decision of the issue presented in this case, we express no opinion as to its proper resolution. The issue is open to the Court of Appeals on remand should the Commission choose to press it.

[9] This fact does not preclude a finding that denials of § 2.206 petitions should be viewed as orders in § 2239(a) "proceedings" for purposes of the judicial review provisions of § 2239(b); "[c]learly, changes in administrative procedures may affect the scope and content of various types of agency orders and thus the subject matter embraced in a judicial proceeding to review such orders." *Foti* v. *INS*, 375 U. S. 217, 230, n. 16 (1963).

The Court of Appeals found this statutory language "clear-cut." 229 U. S. App. D. C., at 445, 712 F. 2d, at 1477. We do not find it so. Though the linkage in § 2239 of the definition of proceeding and hearing could be read as the Court of Appeals read it, see *supra*, at 733–734, § 2239 could as easily be read as reflecting two *independent* congressional purposes: (1) to provide for hearings in licensing proceedings if requested by certain individuals (those "whose interest may be affected"); and (2) to place judicial review of final orders in *all* licensing proceedings in the courts of appeals pursuant to the Hobbs Act irrespective of whether a hearing before the agency occurred or was requested. On this alternative reading, the cross-reference in subsection (b) to "proceeding[s] of the kind specified in subsection (a)," 42 U. S. C. § 2239(b), was meant only to refer to the language "any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license," § 2239(a)(1). If read this way, subsection (b) reflects no congressional intent to limit initial court of appeals review to Commission actions in which a hearing took place.

To discern the correct interpretation of this statute we must therefore decide whether Congress intended to authorize initial court of appeals review by reference to the procedures accompanying agency action (*i. e.*, by reference to whether a hearing was held) or by reference to the subject matter of the agency action (*i. e.*, by reference to whether the order was issued in a licensing proceeding). Adopting the former interpretation, the Court of Appeals relied solely on what it took to be the plain meaning of § 2239. Yet plain meaning, like beauty, is sometimes in the eye of the beholder. The court below inferred "plain meaning" from the conjunction of the hearing requirement and the description of the scope of licensing proceeedings in subsection (a) without consulting indicia of congressional intent in the legislative history or general principles respecting the proper forum for judicial review of agency action. Because we find the statute ambiguous on its face, we seek guidance in the statutory structure, relevant legislative history, congressional purposes expressed in the choice of Hobbs Act review, and general principles respecting the proper allocation of judicial authority to review agency orders. We conclude that these sources indicate that Congress intended to provide for initial court of appeals review of all final orders in licensing proceedings whether or not a hearing before the Commission occurred or could have occurred.

B

Relevant evidence of congressional intent in the legislative history, though fragmentary, supports this interpretation. The legislative metamorphoses of the various bills that eventually became the Atomic Energy Act of 1954 strongly suggest that Congress intended to define the scope of initial court of appeals review according to the subject matter of the Commission action and not according to whether the Commission held a hearing. As originally introduced in both the House and the Senate, the provision governing judicial review (§ 189 of the proposed Act) provided that "[a]ny proceeding to enjoin, set aside, annul or suspend any order of the Commission shall be brought as provided by [the Hobbs Act, 28 U. S. C. § 2341 *et seq.*]." H. R. 8862, 83d Cong., 2d Sess., § 189 (1954); S. 3323, 83d Cong., 2d Sess., § 189 (1954). After hearings by the Joint Committee on Atomic Energy, the judicial review provision was amended to provide for initial court of appeals review of "[a]ny final order granting, denying, suspending, revoking, modifying, or rescinding any license . . . ." Joint Committee on Atomic Energy, 83d Cong., 2d Sess., § 189 (Comm. Print of May 21, 1954). Though this change was unexplained, it appears to have been intended to limit the scope of judicial review to final orders entered in *licensing* proceedings; the earlier version had more broadly authorized review of "any order of the Commission." Soon after the bill incorporating this provision was submitted to the full Congress, a shortcoming in the proposed scope of review became apparent. Judicial review would not extend to final orders in proceedings that terminated short of a suspension, revocation, or amendment of a license; those seeking to challenge Commission decisions *not* to suspend, revoke, or amend could not obtain initial court of appeals review. Remedying this deficiency, Senator Hickenlooper proposed an amendment to expand the authorization for review to final orders issued in "*any proceeding under this act*, for the granting, suspending, revoking, or amending of any license . . . ." Amendment to S. 3690, 83d Cong., 2d Sess., § 189 (July 16, 1954) (emphasis added).

The hearing requirement under the Act developed independently of the review provisions until the last step of the legislative process. As introduced in the House and the Senate, the original bills did not provide for a hearing in licensing determinations. See H. R. 8862, *supra;* S. 3323, *supra.* The lack of a hearing requirement prompted expressions of concern at Committee hearings, S. 3323 and H. R. 8862, To Amend the Atomic Energy Act of 1946: Hearings on

S. 3323 and H. R. 8862 before the Joint Committee on Atomic Energy, 83d Cong., 2d Sess., 65, 113–114, 152–153, 226–227, 328–329, 352–353, 400–401, 416–417 (1954), and led to an amendment to § 181 of the proposed Act providing for a hearing in "any agency action." H. R. 9757, 83d Cong., 2d Sess., § 181 (1954). This provision was soon recognized as too broad a response to the perceived need, see 100 Cong. Rec. 10686 (1954) (remarks of Sen. Pastore) ("That wording was thought to be too broad, broader than it was intended to make it"), and the hearing requirement was tailored to the scope of proceedings authorized under the licensing Subchapter. Senator Hickenlooper accomplished this narrowing with the same amendment he used to broaden the scope of reviewable licensing determinations. He simply proposed to add the hearing requirement to § 189, which until then had governed only judicial review; in this way the hearing authorization was limited to licensing proceedings. Amendment to S. 3690, *supra*, § 189. The proposed amendment was accepted and the current § 2239 reflects its precise wording.

The evolution of the judicial review provision reveals a congressional intent to provide for initial court of appeals review of all final orders in licensing proceedings. When Congress decided on the scope of judicial review, it did so solely by reference to the subject matter of the Commission action and not by reference to the procedural particulars of the Commission action. That the hearing provision evolved independently reinforces the conclusion that Congress had no intention to limit initial court of appeals review to cases in which a hearing occurred or could have occurred. The only possible evidence of congressional intent to limit court of appeals review by reference to the procedures used is the last-minute marriage of the hearing and review provisions in the Hickenlooper Amendment. Nothing in the legislative history affirmatively suggests that Congress intended this conjunction of the hearing and review provisions to limit initial court of appeals review to final orders resulting from proceedings in which a hearing occurred. To the contrary, this semantic conjunction indicates no more than a congressional intent to provide for a hearing in the *types* of proceedings in which initial court of appeals review would take place—that is, licensing proceedings. See 100 Cong. Rec. 10686 (1954) (remarks of Sen. Pastore) ("The amendment limits the provision to hearings on licenses in which a review shall take place").

C

Whether subject-matter jurisdiction over denials of § 2.206 petitions properly lies in the district courts or the courts of appeals must also be considered in light of the basic congressional choice of Hobbs Act review in 42 U. S. C. § 2239(b). The Hobbs Act specifically contemplated initial court of appeals review of agency orders resulting from proceedings in which no hearing took place. See 28 U. S. C. § 2347(b) ("When the agency has not held a hearing . . . the court of appeals shall . . . pass on the issues presented, when a hearing is not required by law and . . . no genuine issue of material fact is presented"). One purpose of the Hobbs Act was to avoid the duplication of effort involved in creation of a separate record before the agency and before the district court. See H. R. Rep. No. 2122, 81st Cong., 2d Sess., 4 (1950) ("[T]he submission of the cases upon the records made before the administrative agencies will avoid the making of two records, one before the agency and one before the court, and thus going over the same ground twice"). Cf. *Harrison* v. *PPG Industries, Inc.*, 446 U. S. 578, 593 (1980) ("The most obvious advantage of direct review by a court of appeals is the time saved compared to review by a district court, followed by a second review on appeal").

Given the choice of the Hobbs Act as the primary method of review of licensing orders, we have no reason to think Congress in the Atomic Energy Act would have intended to preclude initial court of appeals review of licensing proceedings in which a Commission hearing did not occur when the Hobbs Act specifically provides for such review and the consequence of precluding it would be unnecessary duplication of effort.

D

The legislative history and the basic congressional choice of Hobbs Act review lead us to conclude that Congress intended to vest in the courts of appeals initial subject-matter jurisdiction over challenges to Commission denials of § 2.206 petitions. An examination of the consequences that would follow upon adoption of the contrary rule proposed by the Court of Appeals in these cases confirms the soundness of this conclusion. The Court of Appeals did not specify whether it thought § 2239 vested the courts of appeals with initial jurisdiction over only proceedings in which a hearing actually occurred or over proceedings in which a hearing could have occurred had one been requested. Either approach results in consequences that cannot be squared with general principles respecting judicial review of agency action.

If initial review in the court of appeals hinged on whether a hearing before the agency *actually occurred*, then some licensing proceedings will be reviewed in the courts of appeals while others will not depending on whether a hearing is requested. It is clear that § 2239 contemplates the possibility of proceedings without hearings. Absent a request from a person whose interest may be affected by the proceeding no hearing is required. 42 U. S. C. § 2239(a)(1) ("In any proceeding under this chapter . . . the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding"). Thus if no one requests a hearing or if the only request comes from a person whose interest cannot be affected by the issues before the Commission in the proceeding, no hearing will be held. See, *e. g.*, *Bellotti* v. *NRC*, 233 U. S. App. D. C. 274, 725 F. 2d 1380 (1983). The locus of judicial review would thus depend on the "fortuitous circumstance" of whether an interested person requested a hearing, see *Crown Simpson Pulp Co.* v. *Costle*, 445 U. S. 193, 196–197 (1980). This sorting process would result in some final orders in licensing proceedings receiving two layers of judicial review and some receiving only one. "Absent a far clearer expression of congressional intent, we are unwilling to read the Act as creating such a seemingly irrational bifurcated system." *Id.*, at 197.

If initial review in the court of appeals hinged on whether a hearing *could have taken place* had an interested person requested one, different but equally irrational consequences follow. All final orders in full-blown Commission licensing proceedings in which the issue is the granting, suspending, revoking, or amending of a license would be reviewed initially in the court of appeals irrespective of whether a hearing occurred before the agency. But final orders in summary proceedings and informal Commission rulemaking authorized in § 2239(a) would be reviewed initially in the district court because the Commission does not currently provide for a hearing in such situations.[10]

At least two implausible results would flow from excluding orders in such situations from initial review in the court of appeals. First, the resulting duplication of judicial review in the district court and court of appeals, with its attendant delays, would defeat the very purpose of summary or informal procedures before the agency—saving time and effort in cases not worth detailed formal consideration or not requiring a hearing on the record. See *Investment Company Institute* v. *Board of Governors of Federal Reserve System*, 179 U. S. App. D. C. 311, 317–318, 551 F. 2d 1270, 1276–1277 (1977); Verkuil, Judicial Review of Informal Rulemaking, 60 Va. L. Rev. 185, 204 (1974). Second, such an approach would cause bifurcation of review of orders issued in the same proceeding. While the final order in the licensing proceeding would be reviewed initially in the court of appeals, numerous ancillary or preliminary orders denying requests for intervention or a hearing by persons who purport to be affected by the issues in the proceeding would be reviewed initially in the district court. In the absence of specific evidence of contrary congressional intent, however, we have held that review of orders resolving issues preliminary or ancillary to the core issue in a proceeding should be reviewed in the same forum as the final order resolving the core issue. *Foti* v. *INS*, 375 U. S. 217, 227, 232 (1963); see L. Jaffe, Judicial Control of Administrative Action 422 (1965); Currie & Goodman, Judicial Review of Federal Administrative Action: Quest for the Optimum Forum, 75 Colum. L. Rev. 1, 60 (1975).

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[10] For example, the Commission requires a person seeking a hearing in a licensing proceeding to establish at least one contention with basis and specificity, see *BPI* v. *AEC*, 163 U. S. App. D. C. 422, 502 F. 2d 424 (1974), and to make an initial showing that a genuine issue of material fact exists, 10 CFR § 2.749 (1984). Similarly, rulemaking under § 2239(a) is typically accompanied only by notice and comment procedures. See *Connecticut Light & Power Co.* v. *NRC*, 218 U. S. App. D. C. 134, 673 F. 2d 525, cert. denied, 459 U. S. 835 (1982).

The cases before us present no question, and thus we express no opinion, as to the Commission's authority to condition or restrict the statutory hearing requirement of 42 U. S. C. § 2239(a)(1) in these or any other ways. In particular, we express no opinion as to whether the Commission properly denied respondent Lorion's request for a hearing on her § 2.206 petition.

Perhaps the only plausible justification for linking initial review in the court of appeals to the occurrence of a hearing before the agency would be that, absent a hearing, the reviewing court would lack an adequate agency-compiled factual basis to evaluate the agency action and a district court with factfinding powers could make up that deficiency. Such a justification cannot, however, be squared with fundamental principles of judicial review of agency action. "[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp* v. *Pitts*, 411 U. S. 138, 142 (1973). The task of the reviewing court is to apply the appropriate APA standard of review, 5 U. S. C. § 706, to the agency decision based on the record the agency presents to the reviewing court. *Citizens to Preserve Overton Park* v. *Volpe*, 401 U. S. 402 (1971).

If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation. The reviewing court is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry. We made precisely this point last Term in a case involving review under the Hobbs Act. *FCC* v. *ITT World Communications, Inc.*, 466 U. S. 463, 468–469 (1984); see also *Camp* v. *Pitts, supra.* Moreover, a formal hearing before the agency is in no way necessary to the compilation of an agency record. As the actions of the Commission in compiling a 547-page record in this case demonstrate, agencies typically compile records in the course of informal agency action. The APA specifically contemplates judicial review on the basis of the agency record compiled in the course of informal agency action in which a hearing has not occurred. See 5 U. S. C. §§ 551(13), 704, 706.

The factfinding capacity of the district court is thus typically unnecessary to judicial review of agency decisionmaking. Placing initial review in the district court does have the negative effect, however, of requiring duplication of the identical task in the district court and in the court of appeals; both courts are to decide, on the basis of the record the agency provides, whether the action passes muster under the appropriate APA standard of review. One crucial purpose of the Hobbs Act and other jurisdictional provisions that place initial review in the courts of appeals is to avoid the waste attendant upon this duplication of effort. *Harrison* v. *PPG Industries, Inc.*, 446 U. S., at 593; *Investment Company*

Institute, supra, at 317, 551 F. 2d, at 1276. Absent a firm indication that Congress intended to locate initial APA review of agency action in the district courts, we will not presume that Congress intended to depart from the sound policy of placing initial APA review in the courts of appeals.

These considerations apply with full force in the present cases. Locating initial review in the district court would certainly result in duplication of effort and probably result in bifurcation of review in that persons seeking to use § 2.206 petitions to broaden the scope of ongoing Commission proceedings would, if unsuccessful, obtain review in the district court while review of the final order in the proceeding would occur in the court of appeals.[11]

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[11] Respondent Lorion also argues that the Commission itself does not consider its denial of a § 2.206 petition an order issued in a "proceeding" as that term is understood in 42 U. S. C. § 2239(a)(1). This argument is based in large part on the language of 10 CFR § 2.206 (1984). That language authorizes the Director of Nuclear Reactor Regulation to "institute a proceeding" in response to a § 2.206 petition raising substantial safety questions. An order denying a § 2.206 petition is an order refusing to institute a proceeding, respondent Lorion argues, and therefore cannot be an order issued in a proceeding because none has been instituted. Also, in some unfortunate language in its brief before the Court of Appeals below, the Commission argued that respondent Lorion had no right to a hearing because no "proceeding" commences until an order to show cause pursuant to 10 CFR § 2.202 (1984) is issued. See 229 U. S. App. D. C., at 446, 712 F. 2d, at 1478 (quoting Government brief below at 24–25). We do not think the issue of congressional intent as to subject-matter jurisdiction should turn on such semantic quibbles. In neither its regulations nor its initial brief below did the Commission intend to suggest an opinion as to the proper forum for judicial review of denials of § 2.206 petitions. The § 2.206 petition is but the first step in a process that will, if not terminated for any reason, culminate in a full formal proceeding under 42 U. S. C. § 2239(a)(1). We have already made clear that subject-matter jurisdiction to review summary orders terminating licensing proceedings prior to a full hearing should lie in the courts of appeals. See *supra,* at 742–743. The denial of a § 2.206 petition is simply a summary procedure that terminates a proceeding at the first step of the process. Thus initial court of appeals subject-matter jurisdiction over Commission denials of § 2.206 petitions

III

Whether initial subject-matter jurisdiction lies initially in the courts of appeals must of course be governed by the intent of Congress and not by any views we may have about sound policy. *Harrison* v. *PPG Industries, Inc.*, *supra*, at 593. In these cases, the indications of legislative intent we have been able to discern suggest that Congress intended to locate initial subject-matter jurisdiction in the courts of appeals. This result is in harmony with Congress' choice of Hobbs Act review for Commission licensing proceedings in § 2239(b) and is consistent with basic principles respecting the allocation of judicial review of agency action. We therefore hold that 42 U. S. C. § 2239 vests in the courts of appeals initial subject-matter jurisdiction over Commission orders denying § 2.206 citizen petitions. Accordingly, the judgment below is reversed, and the cases are remanded to the Court of Appeals for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, dissenting.

Anyone may write a letter to the Nuclear Regulatory Commission requesting it to initiate enforcement proceedings.[1] Today the Court holds that Congress has required review in the court of appeals whenever the Commission denies such a request. This holding is inconsistent with the plain language

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should not be rejected for the reason that these orders are not products of "proceedings."

This argument in reality is a claim that denials of § 2.206 petitions occur too early in the process to be considered final orders in licensing proceedings. That argument, properly understood, is a claim that such Commission decisions are exercises of enforcement discretion. As such, the argument goes to whether such decisions are reviewable under the APA, see n. 8, *supra*, and not to whether the courts of appeals have initial subject-matter jurisdiction.

[1] The Commission has adopted regulations specifying how such letters should be processed. See 10 CFR § 2.206 (1984).

of the controlling statute and the Commission's regulations. It also ignores the settled principle of administrative law that "individual decisions [of an administrative agency] not to take enforcement action in response to citizen requests are presumptively not reviewable under the Administrative Procedure Act, 5 U. S. C. §§ 701–706." *Heckler* v. *Chaney*, *post*, at 838 (BRENNAN, J., concurring).

I

There is no ambiguity in the language of the relevant statutes. Title 28 U. S. C. § 2342 provides:

> "The court of appeals . . . has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—
>
> . . . . .
>
> "(4) all final orders of the [Nuclear Regulatory Commission] made reviewable by section 2239 of title 42 . . . ."[2]

Thus, the question of statutory construction is whether the Commission's refusal to initiate an enforcement proceeding is a "final orde[r] . . . made reviewable by section 2239 of title 42."

The cross-referenced statute[3] contains two subsections, 42 U. S. C. §§ 2239(a), (b). Subsection (b) confers jurisdiction on the court of appeals to review final orders "entered in any proceeding of the kind specified in subsection (a) of this section." Thus, the orders of the Nuclear Regulatory Commission that are reviewable in the court of appeals are only those entered in the specific kinds of proceedings identified in subsection (a).[4] That subsection requires that the Commission grant a hearing upon the request of any interested person in "any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit, . . . and . . . any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees." Through the cross-reference in subsection (b), proceedings initiated for these purposes are also the proceedings in which the final order of the agency is reviewable in the court of appeals.

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[2] Although the statute actually refers to the Atomic Energy Commission, § 201(f) of the Energy Reorganization Act of 1974, 88 Stat. 1242, 42 U. S. C. § 5841(f), transferred the relevant licensing and regulatory authority of that Commission to the Nuclear Regulatory Commission. Section 301(g) of the same Act provides that the new Commission is successor to the old for purposes of applying statutes governing judicial review. 88 Stat. 1248, 42 U. S. C. § 5871(g).

[3] Title 42 U. S. C. § 2239 was enacted as § 189 of the Atomic Energy Act, 68 Stat. 955.

The Commission has adopted regulations concerning proceedings to modify, suspend, or revoke a license. These regulations provide that the "Director of Nuclear Reactor Regulation . . . may institute a proceeding to modify, suspend, or revoke a license or for such other action as may be proper by serving on the licensee an order to show cause." 10 CFR § 2.202(a) (1984). These proceedings, of course, are the proceedings described in § 2239(a) which are reviewable in the court of appeals under § 2239(b). The Director may initiate these proceedings on his own information or on the basis of materials submitted by any citizen in a request for enforcement which "set[s] forth the facts that constitute the basis for the request." 10 CFR § 2.206(a) (1984).[5] In the latter event, the regulations explain that the Director, at his discretion,[6] either will or will not institute the requested proceeding. § 2.206(b).[7]

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[4] The relevant portion of § 2239(a) reads as follows:

"(1) In any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit, . . . and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, . . . the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding."

[5] "Any person may file a request for the Director of Nuclear Reactor Regulation . . . to institute a proceeding pursuant to § 2.202 to modify, suspend or revoke a license, or for such other action as may be proper."

In this case, respondent Lorion (hereafter respondent) sent a 10-paragraph letter to the Commission urging that safety problems might require a license suspension or a temporary shut-down of Florida Power & Light Co's. Turkey Point Unit #4. App. 8. Three and a half weeks later, the Director of Nuclear Reactor Regulation provided respondent with a written opinion entitled "Director's Decision Under 10 CFR 2.206."[8] As the Commission's regulation plainly states, the Director's decision "shall either initiate the requested proceeding" or shall advise the requesting party "that no proceeding will be instituted in whole or in part, with respect to his request, and the reasons therefor." In this case, the Director's decision plainly was of the latter type; he decided *not* to initiate a proceeding for any of the purposes enumerated in § 2239(a) and § 2.202.

Because no proceeding of the kind described in § 2239(a) was initiated, the Commission was not required to grant respondent's request for a hearing.[9] Likewise, under the express language of § 2239(b), the Director's denial of respondent's request was not a "final order entered in any proceeding of the kind specified in subsection (a)" which would be reviewable in the court of appeals.

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[6] Section 2.206(c)(2) provides that "[n]o petition or other request for Commission review of a Director's decision under this section will be entertained by the Commission." The regulations, however, do allow that in the exceptional case "the Commission may on its own motion review that decision . . . to determine if the Director has abused his discretion."

[7] Section 2.206(b) provides:

"Within a reasonable time after a request pursuant to paragraph (a) of this section has been received, the Director of Nuclear Reactor Regulation . . . *shall either institute the requested proceeding* in accordance with this subpart *or shall advise the person who made the request in writing that no proceeding will be instituted* in whole or in part, with respect to his request, and the reasons therefor." (Emphasis added.)

[8] *In re Florida Power & Light Co. (Turkey Point Plant, Unit 4),* 14 N. R. C. 1078 (1981).

[9] See *Illinois* v. *NRC*, 591 F. 2d 12, 14 (CA7 1979); cf. *Porter County Chapter of the Izaak Walton League of America, Inc.* v. *NRC*, 196 U. S. App. D. C. 456, 462, 606 F. 2d 1363, 1369 (1979). In the Court of Appeals, the Commission defended its refusal to grant respondent a hearing on her

II

The Court rejects the plain and simple construction of the statutory language, observing that "subject-matter jurisdiction should [not] turn on such semantic quibbles." *Ante*, at 745, n. 11. Proper deference to the powers of Congress, however, requires exactly that result. It is hardly an equivocation to argue that "[s]tatutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Park 'N Fly, Inc.* v. *Dollar Park and Fly, Inc.*, 469 U. S. 189, 194 (1985). Even if the Court's tortured effort to generate an ambiguity in the statute were supported by an implicit assumption that the court of appeals is the more efficient forum for review of informal agency decisionmaking, that assumption is debatable at best and does not justify judicial revision of the statutory text.

Congress' failure to provide an avenue for direct appeal to the court of appeals of informal agency decisions like the one involved in this case may well implement its judgment that agency actions "committed to agency discretion by law" are not reviewable by the federal courts. 5 U. S. C. § 701(a)(2). In this case, the Director decided *not* to initiate an enforcement proceeding under § 2239(a) and § 2.202. "This Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion. . . . This recognition of the existence of discretion is attributable in no small part to the general unsuitability for judicial review of agency decisions to refuse enforcement." *Heckler* v. *Chaney*, *post*, at 831.[10]

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§ 2.206 request by succinctly stating that "'[a] request for an enforcement proceeding is just that—a request. Unless and until granted, it is not a "proceeding" where the requester has any right to present evidence.'" See Brief for Respondent 26–27 (quoting Brief for the Nuclear Regulatory Commission in No. 82–1132 (CADC), pp. 24–25).

The reviewability of such decisions does not, in my opinion, depend on the kind of public record that the agency chooses to make before it decides not to initiate an enforcement proceeding. In this case, without adversary presentations, the agency elected to compile a 547-page record from available materials before it denied respondent's request that it commence a proceeding to suspend Florida Power & Light's license. The agency is to be commended for giving the public access to the reasoning that led to its decision. The lengthy record, however, does not make the agency's inaction here any more reviewable than if respondent's request had been rejected in a one-paragraph letter sent by return mail.

There are, of course, cases in which an agency's refusal to initiate an enforcement proceeding constitutes such a clear abdication of the agency's statutory responsibilities that a court may order it to take action. See, *e. g.*, *Dunlop* v. *Bachowski*, 421 U. S. 560, 566–576 (1975). Cases of that kind, however, represent the exception rather than the rule,[11] for "[t]he decision to initiate administrative proceedings against an individual or corporation is very much like the prosecutor's decision to initiate or move forward with a criminal prosecution" which has traditionally been unreviewable. *Butz* v. *Economou*, 438 U. S. 478, 515 (1978).

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[10] See also *Southern R. Co.* v. *Seaboard Allied Milling Corp.*, 442 U. S. 444, 455 (1979); *NLRB* v. *Sears, Roebuck & Co.*, 421 U. S. 132, 138 (1975); *Moog Industries, Inc.* v. *FTC*, 355 U.S. 411, 413 (1958); cf. *United States* v. *Batchelder*, 442 U. S. 114, 124 (1979).

[11] As the *Bachowski* case holds, judicial review in such cases may be authorized by 28 U. S. C. § 1337, conferring jurisdiction on the district court. 421 U. S., at 566. The Court, however, identifies no prior case in which it has held that an agency decision *not* to initiate enforcement proceedings is subject to direct review in a court of appeals.

As the Court recognizes, *ante*, at 735, n. 8, 745–746, n. 11, in this case it is not necessary to decide whether the Director's denial of an informal enforcement request is an exercise of unreviewable agency discretion. The only question raised is whether review of such actions, if any, shall be had in the court of appeals. The view that "Congress has not intended courts to review such mundane matters," *Heckler* v. *Chaney*, *post*, at 839 (BRENNAN, J., concurring), nevertheless, supports an interpretation of § 2239(b) that would deny court of appeals review. Only this construction does justice to the plain meaning of the relevant jurisdictional statutes, to the Commission's regulations, and to settled principles of administrative law.

Accordingly, I respectfully dissent.

WINSTON, SHERIFF, ET AL. v. LEE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 83–1334. Argued October 31, 1984—Decided March 20, 1985

A shopkeeper was wounded by gunshot during an attempted robbery but, also being armed with a gun, apparently wounded his assailant in his left side, and the assailant then ran from the scene. Shortly after the victim was taken to a hospital, police officers found respondent, who was suffering from a gunshot wound to his left chest area, eight blocks away from the shooting. He was also taken to the hospital, where the victim identified him as the assailant. After an investigation, the police charged respondent with, *inter alia*, attempted robbery and malicious wounding. Thereafter the Commonwealth of Virginia moved in state court for an order directing respondent to undergo surgery to remove a bullet lodged under his left collarbone, asserting that the bullet would provide evidence of respondent's guilt or innocence. On the basis of expert testimony that the surgery would require an incision of only about one-half inch, could be performed under local anesthesia, and would result in "no danger on the basis that there's no general anesthesia employed," the court granted the motion, and the Virginia Supreme Court denied respondent's petition for a writ of prohibition and/or a writ of habeas corpus. Respondent then brought an action in Federal District Court to enjoin the pending operation on Fourth Amendment grounds, but the court refused to issue a preliminary injunction. Subsequently, X rays taken just before surgery was scheduled showed that the bullet was lodged substantially deeper than had been thought when the state court granted the motion to compel surgery, and the surgeon concluded that a general anesthetic would be desirable. Respondent unsuccessfully sought a rehearing in the state trial court, and the Virginia Supreme Court affirmed. However, respondent then returned to the Federal District Court, which, after an evidentiary hearing, enjoined the threatened surgery. The Court of Appeals affirmed.

Held: The proposed surgery would violate respondent's right to be secure in his person and the search would be "unreasonable" under the Fourth Amendment. Pp. 758–767.

(a) A compelled surgical intrusion into an individual's body for evidence implicates expectations of privacy and security of such magnitude that the intrusion may be "unreasonable" even if likely to produce evidence of a crime. The reasonableness of surgical intrusions beneath the skin depends on a case-by-case approach, in which the individual's interests in privacy and security are weighed against society's interests in conducting the procedure to obtain evidence for fairly determining guilt or innocence. The appropriate framework of analysis for such cases is provided in *Schmerber* v. *California*, 384 U. S. 757, which held that a State may, over the suspect's protest, have a physician extract blood from a person suspected of drunken driving without violating the suspect's Fourth Amendment rights. Beyond the threshold requirements as to probable cause and warrants, *Schmerber*'s inquiry considered other factors for determining "reasonableness"—including the extent to which the procedure may threaten the individual's safety or health, the extent of intrusion upon the individual's dignitary interests in personal privacy and bodily integrity, and the community's interest in fairly and accurately determining guilt or innocence. Pp. 758–763.

(b) Under the *Schmerber* balancing test, the lower federal courts reached the correct result here. The threats to respondent's safety posed by the surgery were the subject of sharp dispute, and there was conflict in the testimony concerning the nature and scope of the operation. Thus, the resulting uncertainty about the medical risks was properly taken into account. Moreover, the intrusion on respondent's privacy interests and bodily integrity can only be characterized as severe. Surgery without the patient's consent, performed under a general anesthetic to search for evidence of a crime, involves a virtually total divestment of the patient's ordinary control over surgical probing beneath his skin. On the other hand, the Commonwealth's assertions of compelling need to intrude into respondent's body to retrieve the bullet are not persuasive. The Commonwealth has available substantial additional evidence that respondent was the individual who accosted the victim. Pp. 763–766.

717 F. 2d 888, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, MARSHALL, POWELL, STEVENS, and O'CONNOR, JJ., joined. BURGER, C. J., filed a concurring opinion, *post*, p. 767. BLACKMUN and REHNQUIST, JJ., concurred in the judgment.

Stacy F. Garrett III argued the cause and filed a brief for petitioners.

Joseph Ryland Winston argued the cause and filed briefs for respondent.

JUSTICE BRENNAN delivered the opinion of the Court.

Schmerber v. *California*, 384 U. S. 757 (1966), held, *inter alia*, that a State may, over the suspect's protest, have a physician extract blood from a person suspected of drunken driving without violation of the suspect's right secured by the Fourth Amendment not to be subjected to unreasonable searches and seizures. However, *Schmerber* cautioned: "That we today hold that the Constitution does not forbid the States['] minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions." *Id.*, at 772. In this case, the Commonwealth of Virginia seeks to compel the respondent Rudolph Lee, who is suspected of attempting to commit armed robbery, to undergo a surgical procedure under a general anesthetic for removal of a bullet lodged in his chest. Petitioners allege that the bullet will provide evidence of respondent's guilt or innocence. We conclude that the procedure sought here is an example of the "more substantial intrusion" cautioned against in *Schmerber*, and hold that to permit the procedure would violate respondent's right to be secure in his person guaranteed by the Fourth Amendment.

I

A

At approximately 1 a. m. on July 18, 1982, Ralph E. Watkinson was closing his shop for the night. As he was locking the door, he observed someone armed with a gun coming toward him from across the street. Watkinson was also armed and when he drew his gun, the other person told him to freeze. Watkinson then fired at the other person, who returned his fire. Watkinson was hit in the legs, while the other individual, who appeared to be wounded in his left side, ran from the scene. The police arrived on the scene shortly thereafter, and Watkinson was taken by ambulance to the emergency room of the Medical College of Virginia (MCV) Hospital.

Approximately 20 minutes later, police officers responding to another call found respondent eight blocks from where the earlier shooting occurred. Respondent was suffering from a gunshot wound to his left chest area and told the police that he had been shot when two individuals attempted to rob him. An ambulance took respondent to the MCV Hospital. Watkinson was still in the MCV emergency room and, when respondent entered that room, said "[t]hat's the man that shot me." App. 14. After an investigation, the police decided that respondent's story of having been himself the victim of a robbery was untrue and charged respondent with attempted robbery, malicious wounding, and two counts of using a firearm in the commission of a felony.

B

The Commonwealth shortly thereafter moved in state court for an order directing respondent to undergo surgery to remove an object thought to be a bullet lodged under his left collarbone. The court conducted several evidentiary hearings on the motion. At the first hearing, the Commonwealth's expert testified that the surgical procedure would take 45 minutes and would involve a three to four percent chance of temporary nerve damage, a one percent chance of permanent nerve damage, and a one-tenth of one percent chance of death. At the second hearing, the expert testified that on reexamination of respondent, he discovered that the bullet was not "back inside close to the nerves and arteries," *id.*, at 52, as he originally had thought. Instead, he now believed the bullet to be located "just beneath the skin." *Id.*, at 57. He testified that the surgery would require an incision of only one and one-half centimeters (slightly more than one-half inch), could be performed under local anesthesia, and would result in "no danger on the basis that there's no general anesthesia employed." *Id.*, at 51.

The state trial judge granted the motion to compel surgery. Respondent petitioned the Virginia Supreme Court for a writ of prohibition and/or a writ of habeas corpus, both of which were denied. Respondent then brought an action in the United States District Court for the Eastern District of Virginia to enjoin the pending operation on Fourth Amendment grounds. The court refused to issue a preliminary injunction, holding that respondent's cause had little likelihood of success on the merits. 551 F. Supp. 247, 247–253 (1982).[1]

On October 18, 1982, just before the surgery was scheduled, the surgeon ordered that X rays be taken of respondent's chest. The X rays revealed that the bullet was in fact lodged two and one-half to three centimeters (approximately one inch) deep in muscular tissue in respondent's chest, substantially deeper than had been thought when the state court granted the motion to compel surgery. The surgeon now believed that a general anesthetic would be desirable for medical reasons.

Respondent moved the state trial court for a rehearing based on the new evidence. After holding an evidentiary hearing, the state trial court denied the rehearing, and the Virginia Supreme Court affirmed. Respondent then returned to federal court, where he moved to alter or amend the judgment previously entered against him. After an evidentiary hearing, the District Court enjoined the threatened surgery. 551 F. Supp., at 253–261 (supplemental opinion).[2]

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[1] Respondent's action in the District Court was styled as a petition for habeas corpus and an action under 42 U. S. C. § 1983 for a preliminary injunction. Because the District Court denied the relief sought, it found it unnecessary to consider whether res judicata, see *Allen* v. *McCurry*, 449 U. S. 90 (1980), would bar consideration of the § 1983 claim. 551 F. Supp., at 252, n. 4.

[2] Respondent had moved to reopen the petition for habeas corpus, as well as to alter or amend the judgment. Petitioners moved to dismiss the petition for habeas on the ground that respondent was not at that time "in custody" for purposes of 28 U. S. C. § 2241. The District Court rejected this contention, holding that habeas was available because respondent was

A divided panel of the Court of Appeals for the Fourth Circuit affirmed. 717 F. 2d 888 (1983).[3] We granted certiorari, 466 U. S. 942 (1984), to consider whether a State may consistently with the Fourth Amendment compel a suspect to undergo surgery of this kind in a search for evidence of a crime.

II

The Fourth Amendment protects "expectations of privacy," see *Katz* v. *United States*, 389 U. S. 347 (1967)—the individual's legitimate expectations that in certain places and at certain times he has "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." *Olmstead* v. *United States*, 277 U. S. 438,

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objecting to a *future* custody that would take place when the operation was to be performed. 551 F. Supp., at 257–259. The Court of Appeals held that respondent's claim was cognizable only under § 1983. 717 F. 2d 888, 893 (1983). Respondent has not cross-petitioned for review of this holding, and it is therefore not before us.

[3] The Fourth Circuit held that *Allen* v. *McCurry*, *supra*, did not bar respondent's attempt to relitigate in federal court the same Fourth Amendment issues previously litigated in state court. The court agreed with the District Court's conclusion, see 551 F. Supp., at 258–259, that respondent had not had a full and fair opportunity to litigate in the state trial court. 717 F. 2d, at 895–899. Respondent filed his motion for rehearing in state court on October 18, the day he was informed of the changed circumstances regarding the removal of the bullet. On October 19, the state court ordered an evidentiary hearing to be held on October 21. The Court of Appeals was "satisfied from the record that counsel was not able, despite obviously diligent effort, to obtain an independent review of the medical record by outside physicians nor was he able to consult with the independent expert in anesthesiology in order to prepare a presentation on the risks of general anesthesia." *Id.*, at 897. Yet, despite the crucial nature of the medical evidence, the state court refused to grant respondent's repeated request for a continuance. Because "[t]he arbitrary truncation of preparation time deprived [respondent] of a fair opportunity to determine the crucial factors relevant to his claim and to obtain independent expert witnesses to testify about those factors," *id.*, at 898–899, the Court of Appeals refused to grant preclusive effect to the state court's findings. Petitioners do not challenge this ruling.

478 (1928) (Brandeis, J., dissenting). Putting to one side the procedural protections of the warrant requirement, the Fourth Amendment generally protects the "security" of "persons, houses, papers, and effects" against official intrusions up to the point where the community's need for evidence surmounts a specified standard, ordinarily "probable cause." Beyond this point, it is ordinarily justifiable for the community to demand that the individual give up some part of his interest in privacy and security to advance the community's vital interests in law enforcement; such a search is generally "reasonable" in the Amendment's terms.

A compelled surgical intrusion into an individual's body for evidence, however, implicates expectations of privacy and security of such magnitude that the intrusion may be "unreasonable" even if likely to produce evidence of a crime. In *Schmerber* v. *California*, 384 U. S. 757 (1966), we addressed a claim that the State had breached the Fourth Amendment's protection of the "right of the people to be secure in their *persons* . . . against unreasonable searches and seizures" (emphasis added) when it compelled an individual suspected of drunken driving to undergo a blood test. Schmerber had been arrested at a hospital while receiving treatment for injuries suffered when the automobile he was driving struck a tree. *Id.*, at 758. Despite Schmerber's objection, a police officer at the hospital had directed a physician to take a blood sample from him. Schmerber subsequently objected to the introduction at trial of evidence obtained as a result of the blood test.

The authorities in *Schmerber* clearly had probable cause to believe that he had been driving while intoxicated, *id.*, at 768, and to believe that a blood test would provide evidence that was exceptionally probative in confirming this belief. *Id.*, at 770. Because the case fell within the exigent-circumstances exception to the warrant requirement, no warrant was necessary. *Ibid.* The search was not more intrusive than reasonably necessary to accomplish its goals. Nonetheless, Schmerber argued that the Fourth Amendment prohibited the authorities from intruding into his body to extract the blood that was needed as evidence.

Schmerber noted that "[t]he overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State." *Id.*, at 767. Citing *Wolf* v. *Colorado*, 338 U. S. 25, 27 (1949), and *Mapp* v. *Ohio*, 367 U. S. 643 (1961), we observed that these values were "basic to a free society." We also noted that "[b]ecause we are dealing with intrusions into the human body rather than with state interferences with property relationships or private papers—'houses, papers, and effects'—we write on a clean slate." 384 U. S., at 767–768. The intrusion perhaps implicated Schmerber's most personal and deep-rooted expectations of privacy, and the Court recognized that Fourth Amendment analysis thus required a discerning inquiry into the facts and circumstances to determine whether the intrusion was justifiable. The Fourth Amendment neither forbids nor permits all such intrusions; rather, the Amendment's "proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner." *Id.*, at 768.

The reasonableness of surgical intrusions beneath the skin depends on a case-by-case approach, in which the individual's interests in privacy and security are weighed against society's interests in conducting the procedure. In a given case, the question whether the community's need for evidence outweighs the substantial privacy interests at stake is a delicate one admitting of few categorical answers. We believe that *Schmerber*, however, provides the appropriate framework of analysis for such cases.

Schmerber recognized that the ordinary requirements of the Fourth Amendment would be the threshold requirements for conducting this kind of surgical search and seizure. We noted the importance of probable cause. *Id.*, at 768–769.

And we pointed out: "Search warrants are ordinarily required for searches of dwellings, and, absent an emergency, no less could be required where intrusions into the human body are concerned. . . . The importance of informed, detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt is indisputable and great." *Id.*, at 770.

Beyond these standards, *Schmerber's* inquiry considered a number of other factors in determining the "reasonableness" of the blood test. A crucial factor in analyzing the magnitude of the intrusion in *Schmerber* is the extent to which the procedure may threaten the safety or health of the individual. "[F]or most people [a blood test] involves virtually no risk, trauma, or pain." *Id.*, at 771. Moreover, all reasonable medical precautions were taken and no unusual or untested procedures were employed in *Schmerber;* the procedure was performed "by a physician in a hospital environment according to accepted medical practices." *Ibid.* Notwithstanding the existence of probable cause, a search for evidence of a crime may be unjustifiable if it endangers the life or health of the suspect.[4]

Another factor is the extent of intrusion upon the individual's dignitary interests in personal privacy and bodily integrity. Intruding into an individual's living room, see *Payton*

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[4] Numerous courts have recognized the crucial importance of this factor. See, *e. g., Bowden* v. *State*, 256 Ark. 820, 823, 510 S. W. 2d 879, 882 (1974) (refusing to order surgery because of medical risk); *People* v. *Smith*, 80 Misc. 2d 210, 362 N. Y. S. 2d 909 (1974) (same); *State* v. *Allen*, 277 S. C. 595, 291 S. E. 2d 459 (1982) (same); see also 717 F. 2d 888, 900 (CA4 1983) (case below); *id.*, at 905–908 (Widener, J., dissenting); *United States* v. *Crowder*, 177 U. S. App. D. C. 165, 169, 543 F. 2d 312, 316 (1976) (en banc), cert. denied, 429 U. S. 1062 (1977); *State* v. *Overstreet*, 551 S. W. 2d 621, 628 (Mo. 1977) (en banc). See generally Note, 68 Marq. L. Rev. 130, 135 (1984) (discussing cases involving bodily intrusions); Note, 60 Notre Dame L. Rev. 149, 152–156 (1984) (same); Note, 55 Texas L. Rev. 147 (1976) (same); Mandell & Richardson, Surgical Search: Removing a Scar on the Fourth Amendment, 75 J. Crim. L. & C., No. 3, p. 525 (1984).

v. *New York*, 445 U. S. 573 (1980), eavesdropping upon an individual's telephone conversations, see *Katz* v. *United States*, 389 U. S., at 361, or forcing an individual to accompany police officers to the police station, see *Dunaway* v. *New York*, 442 U. S. 200 (1979), typically do not injure the physical person of the individual. Such intrusions do, however, damage the individual's sense of personal privacy and security and are thus subject to the Fourth Amendment's dictates. In noting that a blood test was "a commonplace in these days of periodic physical examinations," 384 U. S., at 771, *Schmerber* recognized society's judgment that blood tests do not constitute an unduly extensive imposition on an individual's personal privacy and bodily integrity.[5]

Weighed against these individual interests is the community's interest in fairly and accurately determining guilt or innocence. This interest is of course of great importance. We noted in *Schmerber* that a blood test is "a highly effective means of determining the degree to which a person is under the influence of alcohol." *Id.*, at 771. Moreover, there was "a clear indication that in fact [desired] evidence [would] be found" if the blood test were undertaken. *Id.*, at 770.

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[5] See also *Schmerber*, 384 U.S, at 771, n. 13 ("'The blood test procedure has become routine in our everyday life. It is a ritual for those going into the military service as well as those applying for marriage licenses. Many colleges require such tests before permitting entrance and literally millions of us have voluntarily gone through the same, though a longer, routine in becoming blood donors'") (quoting *Breithaupt* v. *Abram*, 352 U. S. 432, 436 (1957)). The degree of intrusion in *Schmerber* was minimized as well by the fact that a blood test "involves virtually no risk, trauma, or pain," 384 U. S., at 771, and by the fact that the blood test was conducted "in a hospital environment according to accepted medical practices." *Ibid.* As such, the procedure in *Schmerber* contrasted sharply with the practice in *Rochin* v. *California*, 342 U. S. 165 (1952), in which police officers broke into a suspect's room, attempted to extract narcotics capsules he had put into his mouth, took him to a hospital, and directed that an emetic be administered to induce vomiting. *Id.*, at 166. *Rochin*, recognizing the individual's interest in "human dignity," *id.*, at 174, held the search and seizure unconstitutional under the Due Process Clause.

Especially given the difficulty of proving drunkenness by other means, these considerations showed that results of the blood test were of vital importance if the State were to enforce its drunken driving laws. In *Schmerber*, we concluded that this state interest was sufficient to justify the intrusion, and the compelled blood test was thus "reasonable" for Fourth Amendment purposes.

III

Applying the *Schmerber* balancing test in this case, we believe that the Court of Appeals reached the correct result. The Commonwealth plainly had probable cause to conduct the search. In addition, all parties apparently agree that respondent has had a full measure of procedural protections and has been able fully to litigate the difficult medical and legal questions necessarily involved in analyzing the reasonableness of a surgical incision of this magnitude.[6] Our inquiry therefore must focus on the extent of the intrusion on respondent's privacy interests and on the State's need for the evidence.

The threats to the health or safety of respondent posed by the surgery are the subject of sharp dispute between the parties. Before the new revelations of October 18, the District Court found that the procedure could be carried out "with virtually no risk to [respondent]." 551 F. Supp., at 252. On rehearing, however, with new evidence before it, the District Court held that "the risks previously involved have increased in magnitude even as new risks are being added." *Id.*, at 260.

The Court of Appeals examined the medical evidence in the record and found that respondent would suffer some risks associated with the surgical procedure.[7] One surgeon had testified that the difficulty of discovering the exact location of the bullet "could require extensive probing and retracting of the muscle tissue," carrying with it "the concomitant risks of injury to the muscle as well as injury to the nerves, blood vessels and other tissue in the chest and pleural cavity." 717 F. 2d, at 900. The court further noted that "the greater intrusion and the larger incisions increase the risks of infection." *Ibid.* Moreover, there was conflict in the testimony concerning the nature and the scope of the operation. One surgeon stated that it would take 15–20 minutes, while another predicted the procedure could take up to two and one-half hours. *Ibid.* The court properly took the resulting uncertainty about the medical risks into account.[8]

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[6] Because the State has afforded respondent the benefit of a full adversary presentation and appellate review, we do not reach the question whether the State may compel a suspect to undergo a surgical search of this magnitude for evidence absent such special procedural protections. Cf. *United States* v. *Crowder*, *supra*, at 169, 543 F. 2d, at 316; *State* v. *Lawson*, 187 N. J. Super. 25, 28–29, 453 A. 2d 556, 558 (App. Div. 1982).

Both lower courts in this case believed that the proposed surgery, which for purely medical reasons required the use of a general anesthetic,[9] would be an "extensive" intrusion on respondent's personal privacy and bodily integrity. *Ibid.*

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[7] The Court of Appeals concluded, however, that "the specific physical risks from putting [respondent] under general anesthesia may therefore be considered minimal." 717 F. 2d, at 900. Testimony had shown that "the general risks of harm or death from general anesthesia are quite low, and that [respondent] was in the statistical group of persons with the lowest risk of injury from general anesthesia." *Ibid.*

[8] One expert testified that this would be "minor" surgery. See App. 99. The question whether the surgery is to be characterized in medical terms as "major" or "minor" is not controlling. We agree with the Court of Appeals and the District Court in this case that "there is no reason to suppose that the definition of a medical term of art should coincide with the parameters of a constitutional standard." 551 F. Supp., at 260 (quoted at 717 F. 2d, at 901); accord, *State* v. *Overstreet*, 551 S. W. 2d, at 628. This does not mean that the application of medical concepts in such cases is to be ignored. However, no specific medical categorization can control the multifaceted legal inquiry that the court must undertake.

[9] Somewhat different issues would be raised if the use of a general anesthetic became necessary because of the patient's refusal to cooperate. Cf. *State* v. *Lawson*, *supra*.

When conducted with the consent of the patient, surgery requiring general anesthesia is not necessarily demeaning or intrusive. In such a case, the surgeon is carrying out the patient's own will concerning the patient's body and the patient's right to privacy is therefore preserved. In this case, however, the Court of Appeals noted that the Commonwealth proposes to take control of respondent's body, to "drug this citizen—not yet convicted of a criminal offense—with narcotics and barbiturates into a state of unconsciousness," *id.*, at 901, and then to search beneath his skin for evidence of a crime. This kind of surgery involves a virtually total divestment of respondent's ordinary control over surgical probing beneath his skin.

The other part of the balance concerns the Commonwealth's need to intrude into respondent's body to retrieve the bullet. The Commonwealth claims to need the bullet to demonstrate that it was fired from Watkinson's gun, which in turn would show that respondent was the robber who confronted Watkinson. However, although we recognize the difficulty of making determinations in advance as to the strength of the case against respondent, petitioners' assertions of a compelling need for the bullet are hardly persuasive. The very circumstances relied on in this case to demonstrate probable cause to believe that evidence will be found tend to vitiate the Commonwealth's need to compel respondent to undergo surgery. The Commonwealth has available substantial additional evidence that respondent was the individual who accosted Watkinson on the night of the robbery. No party in this case suggests that Watkinson's entirely spontaneous identification of respondent at the hospital would be inadmissible. In addition, petitioners can no doubt prove that Watkinson was found a few blocks from Watkinson's store shortly after the incident took place. And petitioners can certainly show that the location of the bullet (under respondent's left collarbone) seems to correlate with Watkinson's report that the robber "jerked" to the left. App. 13. The fact that the

Commonwealth has available such substantial evidence of the origin of the bullet restricts the need for the Commonwealth to compel respondent to undergo the contemplated surgery.[10]

In weighing the various factors in this case, we therefore reach the same conclusion as the courts below. The operation sought will intrude substantially on respondent's protected interests. The medical risks of the operation, although apparently not extremely severe, are a subject of considerable dispute; the very uncertainty militates against finding the operation to be "reasonable." In addition, the intrusion on respondent's privacy interests entailed by the operation can only be characterized as severe. On the other hand, although the bullet may turn out to be useful to the Commonwealth in prosecuting respondent, the Commonwealth has failed to demonstrate a compelling need for it. We believe that in these circumstances the Commonwealth has failed to demonstrate that it would be "reasonable" under the terms of the Fourth Amendment to search for evidence of this crime by means of the contemplated surgery.

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[10] There are also some questions concerning the probative value of the bullet, even if it could be retrieved. The evidentiary value of the bullet depends on a comparison between markings, if any, on the bullet in respondent's shoulder and markings, if any, found on a test bullet that the police could fire from Watkinson's gun. However, the record supports some doubt whether this kind of comparison is possible. This is because the bullet's markings may have been corroded in the time that the bullet has been in respondent's shoulder, thus making it useless for comparison purposes. See 717 F. 2d, at 901, n. 15. In addition, respondent argues that any given gun may be incapable of firing bullets that have a consistent set of markings. See Joling, An Overview of Firearms Identification Evidence for Attorneys I: Salient Features of Firearms Evidence, 26 J. Forensic Sci. 153, 154 (1981). The record is devoid of any evidence that the police have attempted to test-fire Watkinson's gun, and there thus remains the additional possibility that a comparison of bullets is impossible because Watkinson's gun does not consistently fire bullets with the same markings. However, because the courts below made no findings on this point, we hesitate to give it significant weight in our analysis.

IV

The Fourth Amendment is a vital safeguard of the right of the citizen to be free from unreasonable governmental intrusions into any area in which he has a reasonable expectation of privacy. Where the Court has found a lesser expectation of privacy, see, *e. g.*, *Rakas* v. *Illinois*, 439 U. S. 128 (1978); *South Dakota* v. *Opperman*, 428 U. S. 364 (1976), or where the search involves a minimal intrusion on privacy interests, see, *e. g.*, *United States* v. *Hensley*, 469 U. S. 221 (1985); *Dunaway* v. *New York*, 442 U. S., at 210–211; *United States* v. *Brignoni-Ponce*, 422 U. S. 873, 880 (1975); *Adams* v. *Williams*, 407 U. S. 143 (1972); *Terry* v. *Ohio*, 392 U. S. 1 (1968), the Court has held that the Fourth Amendment's protections are correspondingly less stringent. Conversely, however, the Fourth Amendment's command that searches be "reasonable" requires that when the State seeks to intrude upon an area in which our society recognizes a significantly heightened privacy interest, a more substantial justification is required to make the search "reasonable." Applying these principles, we hold that the proposed search in this case would be "unreasonable" under the Fourth Amendment.

Affirmed.

JUSTICE BLACKMUN and JUSTICE REHNQUIST concur in the judgment.

CHIEF JUSTICE BURGER, concurring.

I join because I read the Court's opinion as not preventing detention of an individual if there are reasonable grounds to believe that natural bodily functions will disclose the presence of contraband materials secreted internally.

LINDAHL *v.* OFFICE OF PERSONNEL MANAGEMENT

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 83-5954. Argued December 3, 1984—Decided March 20, 1985

The Office of Personnel Management (OPM) "determine[s] questions of disability and dependency" in administering the Federal Government's disability retirement program. 5 U. S. C. § 8347(c). Its "decisions . . . concerning these matters are final and conclusive and are not subject to review," *ibid.*, except to the extent that administrative review by the Merit Systems Protection Board (MSPB) is provided by § 8347(d)(1). In 1979, petitioner, who was employed as a security guard at a naval shipyard, was informed by the Navy that he was to be retired on disability resulting from acute and chronic bronchitis, and he did not contest this assessment. But several months after petitioner had been retired, OPM denied his application for a disability retirement annuity on the ground that the evidence failed to establish that his disability was severe enough to prevent him from performing his job. Petitioner appealed to the MSPB, which sustained the denial. He then filed a complaint in the Court of Claims, invoking jurisdiction under 5 U. S. C. § 7703 (which at the time provided for review of MSPB decisions in that court and the regional courts of appeals) and the Tucker Act. He alleged that the MSPB had violated its regulations by placing the burden of proving disability on him rather than requiring the Navy to disprove disability, and that the Navy had dismissed him while he was attempting to obtain disability retirement benefits, in violation of regulations requiring an agency that initiates a disability retirement action to retain the employee pending OPM's resolution of the employee's disability status. After § 7703 was amended in 1982, the case was transferred to the Federal Circuit, which dismissed the complaint as barred by § 8347(c). The court concluded that the plain words of § 8347(c), along with the structure of the civil service laws and the import of a 1980 amendment adding § 8347(d)(2)—which provides for both MSPB and judicial review of involuntary mental disability retirement decisions—overcome the usual presumption favoring judicial review of administrative action, and, except as qualified by § 8347(d)(2), preclude any judicial review of OPM decisions in voluntary disability retirement cases. While acknowledging that courts had previously interpreted § 8347(c) to permit judicial review of alleged legal and procedural errors, the court found that such interpretation was wrong and in any event overruled by the 1980 amendment.

Held:

1. Section 8347(c) does not bar judicial review altogether of an MSPB judgment affirming OPM's denial of a disability retirement claim, but bars review only of *factual* determinations while permitting review to determine whether "there has been a substantial departure from important procedural rights, a misconstruction of the governing legislation, or some like error 'going to the heart of the administrative determination.'" Pp. 778–791.

(a) It is "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent" that access to judicial review will be restricted. Whether a statute precludes judicial review "is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." Pp. 778–779.

(b) While § 8347(c) plausibly can be read as imposing an absolute bar to judicial review, it also quite naturally can be read as precluding review only of OPM's *factual* determinations about questions of disability and dependency. Under this latter reading, the factual "question" whether an applicant is disabled is quite distinct from questions of what laws and procedures OPM must apply in administering the Civil Service Retirement Act. In addition, the application of § 8347(c) as completely preclusive is problematic when a disability applicant, as here, challenges not only OPM's determinations but also the standards and procedures used by the MSPB in reviewing those determinations. Finally, Congress' failure to use the unambiguous and comprehensive language in § 8347(c) that it typically uses when intending to bar all judicial review reinforces the possibility that the finality bar may extend only to OPM's *factual* determinations with respect to disability questions. Pp. 779–780.

(c) Under the *Scroggins* standard (so-called after *Scroggins* v. *United States*, 184 Ct. Cl. 530, 397 F. 2d 295, cert. denied, 393 U. S. 952), courts prior to the 1980 amendment had interpreted § 8347(c) as allowing for review of legal and procedural errors in disability retirement decisions. There is nothing in the legislative history of the 1980 amendment adding § 8347(d)(2) to suggest that Congress intended to discard the *Scroggins* standard. To the contrary, the legislative history demonstrates that Congress was well aware of the *Scroggins* standard, amended § 8347 on its understanding that that standard applied to judicial review of disability retirement decisions generally, and intended that *Scroggins* review continue except to the extent augmented by the more exacting standards of § 8347(d)(2). Pp. 780–791.

2. The Federal Circuit has jurisdiction directly to review MSPB disability retirement decisions pursuant to the jurisdictional grants in 5 U. S. C. § 7703(b)(1), providing that a petition to review a final decision of the MSPB shall be filed in the Federal Circuit, and 28 U. S. C. § 1295(a)(9), providing the Circuit with exclusive jurisdiction of an appeal from a final decision of the MSPB. Pp. 791–799.

(a) An applicant, such as petitioner, whose appeal is rejected by the MSPB is not required to file a Tucker Act suit in the Claims Court or a district court, and then seek review of any adverse decision in the Federal Circuit. To require such a two-step judicial process would not accord with the jurisdictional framework established by the Civil Service Reform Act of 1978 (CSRA) and the Federal Courts Improvement Act of 1982 (FCIA). Sections 7703(b)(1) and 1295(a)(9) together provide the Federal Circuit with exclusive jurisdiction over MSPB decisions and do not admit any exceptions for disability retirement claims. Pp. 791–796.

(b) Congress in the FCIA intended to channel those Tucker Act cases in which the Court of Claims performed an appellate function into the Federal Circuit and to leave cases requiring *de novo* factfinding in the Claims Court and district courts. Review of an MSPB order involving a disability retirement claim not only is explicitly encompassed in the Federal Circuit's jurisdiction, but also makes logical sense, given that the court considers only legal and procedural questions and does not review the factual bases of the administrative decision. A contrary conclusion would result in exactly the sort of "duplicative, wasteful and inefficient" judicial review that the CSRA and FCIA were intended to eradicate. Pp. 796–799.

718 F. 2d 391, reversed and remanded.

BRENNAN, J., delivered the opinion of the Court, in which MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined. WHITE, J., filed a dissenting opinion, in which BURGER, C. J., and REHNQUIST and O'CONNOR, JJ., joined, *post*, p. 800.

John Murcko, by appointment of the Court, 469 U. S. 811, argued the cause and filed briefs for petitioner.

Edwin S. Kneedler argued the cause for respondent. With him on the brief were *Solicitor General Lee, Acting Assistant Attorney General Willard, Deputy Solicitor General Geller, David M. Cohen, William G. Kanter,* and *Robert A. Reutershan.**

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*Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union by *Burt Neuborne;* for the American Federation of

JUSTICE BRENNAN delivered the opinion of the Court.

The Office of Personnel Management (OPM) "determine[s] questions of disability and dependency" in administering the Federal Government's provision of annuities to retired employees and their dependents. 5 U. S. C. § 8347(c). Subject to administrative review by the Merit Systems Protection Board (MSPB), § 8347(d)(1), OPM's "decisions . . . concerning these matters are final and conclusive and are not subject to review," § 8347(c). This case presents two questions of substantial importance to the administration of the Government's retirement annuity program. The first is whether § 8347(c) bars judicial review altogether of an MSPB judgment affirming the denial by OPM of a disability retirement claim, or bars review only of *factual* determinations while permitting review for alleged errors of law and procedure. If judicial review is available to the latter, limited extent, a second question arises: whether the United States Court of Appeals for the Federal Circuit has jurisdiction directly to review MSPB decisions in such cases, or whether an applicant whose appeal is rejected by the MSPB must instead file a Tucker Act claim in the United States Claims Court or a United States district court, from which an appeal could then be taken to the Federal Circuit.

I

A

These questions implicate a host of overlapping statutory schemes, which we review before turning to the case at hand.

The Civil Service Retirement Act (Retirement Act).[1] Government employees who are covered by the Retirement

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Government Employees, AFL-CIO, by *Stuart A. Kirsch* and *Mark D. Roth;* and for the National Association of Retired Federal Employees by *Irving Kator, Joseph B. Scott, James H. Heller, and Michael J. Kator.*

Briefs of *amici curiae* were filed for Willard Bronger et al. by *Max G. Brittain, Jr.;* and for Margaret Cheeseman et al. by *Edith U. Fierst.*

[1] Ch. 95, 41 Stat. 614, as amended, 5 U. S. C. § 8301 *et seq.*

Act are required to contribute a portion of their salaries to the Civil Service Retirement and Disability Fund. 5 U. S. C. §§8334(a), (b). The amount of retirement annuity is based on the employee's average pay and years of federal service. §8339. The Retirement Act provides for several types of annuities; at issue here are disability retirement annuities. Pursuant to §8337, a covered employee who has completed at least five years of federal civilian service is eligible for an immediate annuity if found "disabled," whether he is retired on his own application ("voluntary" retirement) or on the application of his employing agency ("involuntary" retirement). §8337(a).[2]

Although the Retirement Act at no time has contained a general judicial review provision, this Court concluded almost 50 years ago that a retired employee may secure judicial review of an agency denial of his annuity claim by invoking the district courts' Tucker Act jurisdiction to entertain monetary claims against the United States. *Dismuke* v. *United States*, 297 U. S. 167 (1936). The Court reasoned:

> "[I]n the absence of compelling language, resort to the courts to assert a right which the statute creates will be deemed to be curtailed only so far as authority to decide is given to the administrative officer. . . . If he is authorized to determine questions of fact his decision must be accepted unless he exceeds his authority by making a determination which is arbitrary or capricious or unsupported by evidence . . . , or by failing to follow a procedure which satisfies elementary standards of fairness and reasonableness essential to the due conduct of the

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[2] An employee is "disabled" within the meaning of the Retirement Act if he is "unable, because of disease or injury, to render useful and efficient service in [his] position and is not qualified for reassignment . . . to a vacant position which is in the agency at the same grade or level and in which [he] would be able to render useful and efficient service." 5 U. S. C. §8337(a).

> proceeding which Congress has authorized . . . ." *Id.*, at 172.

The civil service laws later were amended to incorporate a finality provision limiting judicial review of dependency and disability determinations. See ch. 84, § 12(d) (3), 62 Stat. 56. As originally enacted, the finality provision provided:

> "Questions of dependency and disability arising under this section shall be determined by the Civil Service Commission and its decisions *with respect to such matters* shall be final and conclusive and shall not be subject to review. The Commission may order or direct at any time such medical or other examinations as it shall deem necessary *to determine the facts* relative to the nature and degree of disability . . . ." *Ibid.* (emphasis added).

This provision has undergone several revisions since 1948;[3] as now codified at 5 U. S. C. § 8347(c), the relevant language provides that determinations "concerning these matters are final and conclusive and are not subject to review."

The Civil Service Reform Act of 1978 (CSRA).[4] This legislation comprehensively overhauled the civil service system. Several of the CSRA's provisions bear on this case. First, Congress abolished the Civil Service Commission and created the OPM, which is now responsible for administering the Retirement Act. CSRA §§ 201, 906, 92 Stat. 1118, 1224; see 5 U. S. C. § 8347(a). Second, Congress created the MSPB, and directed that one of the Board's duties would be to review OPM's decisions in Retirement Act cases "under procedures prescribed by the Board." CSRA § 906, 92 Stat. 1225; see 5 U. S. C. § 8347(d)(1). Third, Congress created a new framework for evaluating adverse personnel actions against "employees" and "applicants for employment": it established exacting standards for review of such actions by the MSPB, provided that "employees" and "applicants for employment" could obtain judicial review of MSPB decisions, and specified the standards for judicial review of such actions. CSRA § 205, 92 Stat. 1138, 5 U. S. C. §§ 7701, 7703 (1976 ed., Supp. V).[5] Finally, Congress provided generally that jurisdiction over "a final order or final decision of the Board" would be in the Court of Claims, pursuant to the Tucker Act, or in the regional courts of appeals, pursuant to 28 U. S. C. § 2342. See CSRA § 205, 92 Stat. 1143, 5 U. S. C. § 7703(b)(1) (1976 ed., Supp. V).

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[3] The finality language originally applied only to survivorship benefits, but was extended to disability retirement claims by the Civil Service Retirement Act Amendments of 1956, § 401, 70 Stat. 743; the only relevant legislative history states that "[t]he bill makes no change in the existing general administrative provisions." S. Rep. No. 2642, 84th Cong., 2d Sess., 13 (1956). Subsequent amendments prior to 1980, see *infra*, at 774–775, were solely of a technical nature.

[4] Pub. L. 95–454, 92 Stat. 1111 *et seq.*

Public Law 96-500 ("the 1980 amendment"). Congress revisited the finality language of 5 U. S. C. § 8347 in 1980, and enacted legislation providing that one subclass of Retirement Act applicants would enjoy the enhanced administrative and judicial review provisions of the recently enacted CSRA:

> "In the case of any individual found by [OPM] to be disabled in whole or in part on the basis of the individual's mental condition, and that finding was made pursuant to an application by an agency for purposes of disability retirement under section 8337(a) of this title, the [MSPB review] procedures under section 7701 of this title shall

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[5] In the MSPB review proceeding, the appellant is entitled to an evidentiary hearing, to a transcript, and to the presence of an attorney or other representative. Attorney's fees may be awarded in certain circumstances. The agency generally bears the burden of proving by a preponderance of the evidence that its decision was correct. 5 U. S. C. §§ 7701(a), (c), (g). A court may set aside the MSPB's decision if it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; obtained without following applicable procedures; or "unsupported by substantial evidence" in the record. § 7703(c).

> apply and the decision of the Board shall be subject to judicial review under section 7703 of this title." Pub. L. 96–500, 94 Stat. 2696, as codified in 5 U. S. C. § 8347(d)(2).

The Federal Courts Improvement Act of 1982 (FCIA).[6] In the FCIA, Congress combined the appellate portions of the Court of Claims' Tucker Act jurisdiction with certain elements of the regional courts of appeals' jurisdiction, and vested jurisdiction over these matters in a new United States Court of Appeals for the Federal Circuit. FCIA § 127, 96 Stat. 37, 28 U. S. C. § 1295. Whereas the Court of Claims and the regional courts of appeals formerly shared jurisdiction over appeals from the MSPB, the Federal Circuit now has exclusive jurisdiction "of an appeal from a final order or final decision" of the Board pursuant to, *inter alia*, 5 U. S. C. § 7703(b)(1). 28 U. S. C. § 1295(a)(9); see FCIA § 144, 96 Stat. 45.

B

Until his retirement, the petitioner Wayne Lindahl served as a civilian security guard at the Mare Island Naval Shipyard in Vallejo, Cal. Lindahl suffers from acute and chronic bronchitis, allegedly aggravated in part by his exposure over the years to chemical irritants at Mare Island. In September 1979, the Department of the Navy informed Lindahl that he would be retired "because your physical condition has disabled you to such an extent that you are unable to perform the full range of duties required of your position as a Police Officer." App. 10. Lindahl agreed with the Navy's assessment and chose not to contest his separation.

Both before and after his retirement, Lindahl took steps to apply for a disability retirement annuity.[7] OPM denied

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[6] Pub. L. 97–164, 96 Stat. 25 *et seq.*

[7] The day after the Navy informed Lindahl of his impending retirement, he submitted a physician's statement to the Navy on a form that is used to accompany an application for retirement benefits, 1 MSPB Record 83–84,

Lindahl's claim several months after he had been retired on the ground that the evidence "fails to establish that you have a disability severe enough to prevent useful, efficient, and safe performance of the essential duties of the position from which you are seeking retirement." *Id.*, at 21. Pursuant to 5 U. S. C. § 8347(d), Lindahl appealed this decision to the MSPB. The Board sustained OPM's denial, finding that Lindahl had not demonstrated by a preponderance of the evidence that he was disabled within the meaning of the Retirement Act. App. 40.[8]

Lindahl then filed a complaint in the Court of Claims, invoking that court's jurisdiction under 5 U. S. C. § 7703 and the Tucker Act, 28 U. S. C. § 1491. App. 42–44. He charged that the MSPB had violated the CSRA and MSPB regulations by placing the burden of proving disability on him rather than requiring the agency to disprove disability. ¶ 14, App. 43.[9] He also alleged that the Navy had dismissed him while he was attempting to obtain disability retirement benefits, in violation of regulations requiring an agency that initiates a disability retirement action to retain the employee pending OPM's resolution of the employee's disability status.

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but he did not file a formal application with the OPM until four days after his removal became final, App. 17–19.

[8] The Board also stated that "a conclusion by the agency that an employee is not fit to continue satisfactory duty performance is not dispositive of the issue of whether he is totally disabled under 5 U. S. C. 8331(6) so as to be eligible for a disability annuity under 5 U. S. C. 8337 from OPM." *Id.*, at 34.

[9] Lindahl argued that, since the Navy instituted the retirement action against him, the adverse action procedures set forth in 5 U. S. C. § 7701 required that the OPM demonstrate by a preponderance of the evidence that he was disabled. § 7701(c)(1)(B). Lindahl similarly contended that MSPB's regulations were properly interpreted to place the burden of proof on the OPM. See 5 CFR §§ 1201.3(a)(6), 1201.56(a) (1984). Cf. *Chavez* v. *OPM*, 6 M. S. P. B. 343, 348–349 (1981) (appeals in retirement cases are subject to § 7701 procedures).

¶16, App. 44.[10] After Congress enacted the FCIA in 1982, Lindahl's case was transferred to the Federal Circuit. The OPM moved to dismiss, arguing in the alternative (1) that judicial review of legal and procedural questions, as well as of factual determinations, is altogether barred in Retirement Act cases by 5 U. S. C. §8347(c); and (2) that the jurisdictional provisions of §7703 are limited to "employees," that retired employees are no longer "employees," and that the Federal Circuit therefore lacks direct jurisdiction of appeals from MSPB decisions in Retirement Act cases. The MSPB intervened as an *amicus curiae* in support of Lindahl's reviewability and jurisdictional contentions.

The Federal Circuit sitting en banc dismissed Lindahl's appeal as barred by §8347(c). 718 F. 2d 391 (1983). The court concluded that the plain words of the subsection, along with the structure of the civil service laws and the import of the 1980 amendment, overcome the usual presumption favoring judicial review of administrative action. The court acknowledged that courts for almost 30 years had interpreted §8347(c) to permit judicial review of alleged legal and procedural errors, but concluded that "those cases . . . would have to be viewed as wrongly decided and overruled." *Id.*, at 396. The court also rejected Lindahl's argument that the legislative history of the 1980 amendment indicated Congress' intention to preserve limited judicial review in Retirement Act cases. Two judges filed qualified concurring opinions. *Id.*, at 400 (Nichols, J.), 405 (Nies, J.). Four others dissented, arguing, *inter alia*, that the legislative history of the 1980 amendment demonstrates Congress' awareness of the previous judicial construction of § 8347(c) and its intention to preserve judicial review to the extent previously recognized. *Id.*, at 405 (Davis, J., joined by Friedman, Kashiwa, and Smith, JJ.), 407 (Smith, J., joined by Friedman, Davis, and Kashiwa, JJ.).[11]

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[10] Lindahl claimed that, since the Navy had initiated his separation on grounds of his disability, see App. 10–15, it was required under applicable personnel regulations to retain him in an active-duty status pending decision by the OPM on the Navy's proposed disability separation. See FPM Supplement 831-1, Subch. S10–10(a)(6) (1978), reprinted in App. to Brief for Petitioner 22a. We express no views on the merits of Lindahl's allegations or his construction of the pertinent statutes and regulations.

Lindahl's complaint also alleged that the disability denial was not supported by substantial evidence. ¶15, App. 43. Lindahl has not pursued this allegation on appeal, and in any event it is barred by 5 U. S. C. §8347(c).

We granted certiorari. 467 U. S. 1251 (1984). We reverse.

II

We have often noted that "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 141 (1967). See also *Dunlop* v. *Bachowski*, 421 U. S. 560, 568 (1975). The Court previously has applied just such a presumption in Retirement Act cases, albeit prior to the enactment of § 8347(c). See *Dismuke* v. *United States*, 297 U. S., at 172 (judicial review presumed available "in the absence of compelling [statutory] language" to the contrary). Of course, the "clear and convincing evidence" standard has never turned on a talismanic test. *Block* v. *Community Nutrition Institute*, 467 U. S. 340, 345–346 (1984). Rather, the question whether a statute precludes judicial review "is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." *Id.*, at 345.

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[11] Prior to the FCIA's vesting of review over MSPB decisions in the Federal Circuit, the regional Courts of Appeals had divided over the effect of the 1980 amendment on the proper construction of § 8347(c). Some had held that the amended § 8347 continues only to bar factual scrutiny of disability determinations while permitting review for legal and procedural errors. See, *e. g.*, *Pitzak* v. *OPM*, 710 F. 2d 1476, 1478–1479 (CA10 1983); *Turner* v. *OPM*, 228 U. S. App. D. C. 94, 97–99, 707 F. 2d 1499, 1502–1504 (1983); *McCard* v. *MSPB*, 702 F. 2d 978, 980–983 (CA11 1983); *Parodi* v. *MSPB*, 702 F. 2d 743, 745–748 (CA9 1982). Others had held that it altogether bars review. See, *e. g.*, *Chase* v. *Director, OPM*, 695 F. 2d 790, 791 (CA4 1982); *Campbell* v. *OPM*, 694 F. 2d 305, 307–308 (CA3 1982); *Morgan* v. *OPM*, 675 F. 2d 196, 198–201 (CA8 1982). But see *Lancellotti* v. *OPM*, 704 F. 2d 91, 96–98 (CA3 1983) (reading § 8347(c) to permit review for alleged legal error, and grounding jurisdiction on 28 U. S. C. § 2342(6) (1976 ed., Supp. V)).

The Federal Circuit reasoned that § 8347(c), except as qualified by § 8347(d)(2), plainly precludes any judicial review of OPM decisions in voluntary disability retirement cases: "[i]t is difficult to conceive of a more clear-cut statement of congressional intent to preclude review than one in which the concept of finality is thrice repeated in a single sentence." 718 F. 2d, at 393. We do not share the Federal Circuit's certainty with respect to the plain import of the statutory language. To begin with, while § 8347(c) plausibly can be read as imposing an absolute bar to judicial review, it also quite naturally can be read as precluding review only of OPM's *factual* determinations about "questions of disability and dependency." Under this reading of § 8347(c)'s language, the factual "question" whether an applicant is disabled is quite distinct from questions of what laws and procedures the OPM must apply in administering the Retirement Act.[12] In addition, the application of § 8347(c) as completely preclusive is problematic when a disability applicant, as here, challenges not only OPM's determinations but also the standards and procedures used by the MSPB in reviewing those determinations. Section 8347(c) speaks of the preclusive effect of OPM determinations, but says nothing one way or the other about the finality of MSPB judgments. Finally, our hesitation regarding the "plain meaning" of § 8347(c) is compounded by the fact that, when Congress intends to bar judicial review altogether, it typically employs language far more unambiguous and comprehensive than that set forth in § 8347.[13] Congress' failure to use similar language in § 8347(c) therefore reinforces the possibility that the finality bar may extend only to OPM's *factual* determinations "with respect to" disability and dependency questions.

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[12] This reading is reinforced by the third sentence of § 8347(c), which provides that the OPM may take appropriate steps "to determine the facts concerning disability or dependency of an individual." The juxtaposition of the finality language with the language concerning OPM's determinations of "the facts" of disability arguably suggests that the finality language does not extend to procedural or legal questions.

Until Congress' 1980 amendment of § 8347, this was precisely the interpretation adopted by courts in reviewing disability retirement decisions by the OPM and its predecessor, the Civil Service Commission. Under the "*Scroggins*" standard, so-called after *Scroggins* v. *United States*, 184 Ct. Cl. 530, 397 F. 2d 295, cert. denied, 393 U. S. 952 (1968), courts acknowledged that § 8347(c) imposes "a special and unusual restriction on judicial examination, and under it courts are not as free to review Commission retirement decisions as they would be if the 'finality' clause were not there." 184 Ct. Cl., at 533–534, 397 F. 2d, at 297. Accordingly, courts emphasized that they could not weigh the evidence or even apply the traditional substantial-evidence standard for reviewing disability determinations. *Id.*, at 534, 397 F. 2d, at 297. Courts also held, however, that § 8347(c)'s finality language did not prevent them from reviewing Commission decisions to determine whether there had been "'a substantial departure from important procedural rights, a misconstruction of the governing legislation, or some like error "going to the heart of the administrative determination."'" *Ibid.*[14]

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[13] See, *e. g.*, 5 U. S. C. § 8128(b) (compensation for work injuries) ("The action of the Secretary [of Labor] or his designee in allowing or denying a payment under this subchapter is—(1) final and conclusive for all purposes and with respect to all questions of law and fact; and (2) not subject to review by another official of the United States or by a court by mandamus or otherwise"). See also 38 U. S. C. § 211(a) (veterans' benefits) ("[T]he decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise").

The Federal Circuit nevertheless believed that Congress' revision of § 8347 in 1980 "provide[s] compelling evidence of its intent to preclude judicial review of MSPB decisions on voluntary disability retirement claims." 718 F. 2d, at 394. Again employing a "plain words" analysis, the court reasoned that the addition of § 8347(d)(2)—providing for MSPB review of involuntary mental disability retirement decisions pursuant to the standards of § 7701 and for judicial review of such decisions pursuant to the standards of § 7703—demonstrates that Congress intended all other types of disability retirement decisions to be unreviewable. "To hold that judicial review of all § 8347(d)(1) decisions had all along been available under § 7703, would be to render superfluous Congress' action in § 8347(d)(2), making judicial review available for particular claims under § 7703." *Id.*, at 399.

Again we cannot agree that the meaning of the 1980 amendment is "plain" on its face. The *Scroggins* standard allows only for review of legal and procedural errors. The 1980 amendment added § 8347(d)(2), which provides special safeguards in cases of involuntary mental disability retirements. That subsection incorporates § 7703, which provides,

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[14] See also *Fitzgerald* v. *United States*, 224 Ct. Cl. 215, 220, 623 F. 2d 696, 699 (1980); *Polos* v. *United States*, 223 Ct. Cl. 547, 559–560, n. 9, 621 F. 2d 385, 391, n. 9 (1980); *Fancher* v. *United States*, 218 Ct. Cl. 504, 509–510, 588 F. 2d 803, 806 (1978); *Allen* v. *United States*, 215 Ct. Cl. 524, 529–530, 571 F. 2d 14, 17–18 (1978), overruled on other grounds, *Polos* v. *United States*, *supra; McFarland* v. *United States*, 207 Ct. Cl. 38, 46–47, 517 F. 2d 938, 942–943 (1975), cert. denied, 423 U. S. 1049 (1976); *Lech* v. *United States*, 187 Ct. Cl. 471, 476, 409 F. 2d 252, 255 (1969); *McGlasson* v. *United States*, 184 Ct. Cl. 542, 548–549, 397 F. 2d 303, 307 (1968); *Gaines* v. *United States*, 158 Ct. Cl. 497, 502, cert. denied, 371 U. S. 936 (1962); *Smith* v. *Dulles*, 99 U. S. App. D. C. 6, 9, 236 F. 2d 739, 742, cert. denied, 352 U. S. 955 (1956); *Matricciana* v. *Hampton*, 416 F. Supp. 288, 289 (Md. 1976); *Cantrell* v. *United States*, 240 F. Supp. 851, 853 (WDSC 1965), aff'd, 356 F. 2d 915 (CA4 1966).

inter alia, for a substantial-evidence standard of review of the factual bases of OPM's decisions. Given the much more deferential *Scroggins* standard of review, there would be nothing "superfluous" about an amendment providing for the full measure of judicial review pursuant to § 7703 in one subclass of retirement cases. There is certainly nothing on the face of the 1980 amendment suggesting that Congress intended to discard *Scroggins* review generally while expanding upon it in a particular category of cases. Absent more compelling indicia of congressional intent—whether from the overall statutory structure or from the legislative history—we thus believe in these circumstances that "'[t]he mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others.'" *Abbott Laboratories* v. *Gardner*, 387 U. S., at 141 (citation omitted).

Moreover, the fact that Congress amended § 8347 in 1980 without explicitly repealing the established *Scroggins* doctrine itself gives rise to a presumption that Congress intended to embody *Scroggins* in the amended version of § 8347.[15] We need not rely on the bare force of this presumption here, however, because the legislative history of the 1980 amendment demonstrates that Congress was indeed well aware of the *Scroggins* standard, amended § 8347 on its understanding that *Scroggins* applied to judicial review of disability retirement decisions generally, and intended that *Scroggins* review continue except to the extent augmented by the more exacting standards of § 8347(d)(2).

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[15] "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change, see *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 414 n. 8 (1975); *NLRB* v. *Gullett Gin Co.*, 340 U. S. 361, 366 (1951); *National Lead Co.* v. *United States*, 252 U. S. 140, 147 (1920); 2A C. Sands, Sutherland on Statutory Construction § 49.09 and cases cited (4th ed. 1973). So too, where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." *Lorillard* v. *Pons*, 434 U. S. 575, 580–581 (1978). See also *Bob Jones University* v. *United States*, 461 U. S. 574, 601–602 (1983); *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U. S. 353, 381–382 (1982).

The 1980 amendment to § 8347 grew out of investigations and oversight hearings conducted by the Subcommittee on Compensation and Employee Benefits of the House Committee on Post Office and Civil Service. In a 1978 Report, the Subcommittee found that several Government agencies had used involuntary mental disability retirements as a disciplinary tool against unpopular employees and that the finality language of § 8347(c) had worked a "devastating effect" on the ability of courts to scrutinize the evidentiary underpinnings of such dismissals. Forced Retirement/Psychiatric Fitness for Duty Exams, 95th Cong., 2d Sess., 15 (Comm. Print 1978) (Subcommittee Report). The Subcommittee emphasized its understanding that § 8347(c) did not "eliminate the constitutional right of appeal of the courts in the case of official 'arbitrary and capricious conduct.'" *Ibid.* Citing numerous Court of Claims cases, including *Scroggins*, the Subcommittee stated that under the judicial construction of § 8347(c) a retired employee could obtain judicial relief if he could "show one of the three following conditions: there has been a substantial departure from important procedural rights, a misconstruction of governing legislation, and an error going to the heart of the administrative determinations." Subcommittee Report, at 15.[16] The Subcommittee criticized this construction "as imposing an almost impossible heavy burden of proof" on retired employees, *ibid.*, and accordingly called for the outright repeal of the preclusion language of § 8347(c), *id.*, at 20.

These recommendations were embodied in legislation introduced the following year by Representative Spellman, the

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[16] The Subcommittee analyzed three Court of Claims cases: *Gaines* v. *United States*, *supra;* *McGlasson* v. *United States*, *supra;* and *Scroggins* v. *United States*, 184 Ct. Cl. 530, 397 F. 2d 295, cert. denied, 393 U. S. 952 (1968). See Subcommittee Report, at 15. See also *id.*, at 19–20.

Subcommittee's Chair. H. R. 2510, 96th Cong., 1st Sess. (1979). In hearings on the proposed bill, representatives from OPM noted that outright repeal of § 8347(c)'s finality provision would result in full judicial review of all OPM disability and dependency decisions, and objected that such broad review was unwarranted and *unnecessary:* under § 8347(c) as it had long been interpreted,

> "if there are questions of proper procedure or constitutional issues, these questions may be raised in the Federal court system. Only the questions *[sic]* of disability itself, which is a question of medical fact, is actually barred from judicial review by section 8347(c).
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> "We believe that these protections are adequate. . . . The courts already may review questions of procedure as distinguished from questions of fact concerning the disability itself, and employees are, therefore, not entirely precluded from obtaining judicial review." Hearing on H. R. 2510 before the Subcommittee on Compensation and Employee Benefits of the House Committee on Post Office and Civil Service, 96th Cong., 1st Sess., 4 (1979) (Subcommittee Hearing) (statement of Gary Nelson, Associate Director, Compensation Group, OPM).

Thereafter, the full Committee adopted an amendment in the nature of a substitute to H. R. 2510 that limited full judicial review "to cases involving agency-filed applications for disability retirement based on an employee's mental condition." H. R. Rep. No. 96–1080, p. 2 (1980). The Director of OPM, Alan K. Campbell, then wrote the Chairman of the Committee to inform him that, in light of the elimination of the "sweeping" judicial review originally proposed, OPM was now prepared to support the measure:

> "We believe that it is reasonable and proper to restrict *expanded* judicial review to involuntary disability retirements. An employee who voluntarily applies for disability retirement seeks to establish title to a benefit

> granted by law; the Office of Personnel Management is the administrative agency charged under the law with the managerial function of adjudicating disability retirement claims. It is appropriate, therefore, that OPM decisions on voluntary applications be conclusive, *reviewable only to determine whether there has been a substantial procedural error, misconstruction of governing legislation, or some like error going to the heart of the administrative determination.*" Letter from Alan K. Campbell to Rep. James M. Hanley (May 14, 1980), reprinted in H. R. Rep. No. 96–1080, at 8 (emphasis added).[17]

Director Campbell made these identical representations to the Chairman of the Senate Committee on Governmental Affairs, see Letter from Alan K. Campbell to Sen. Abraham A. Ribicoff (Sept. 25, 1980), reprinted in S. Rep. No. 96–1004, pp. 4–5 (1980); his letter was cited in the Senate Report as providing "further reinforce[ment]" for and an "endorsement" of the Committee's position on the proper scope of the amendment, *id.*, at 3.

Notwithstanding that this history strongly suggests that Congress restricted the scope of its revision of §8347 precisely on the understanding that limited judicial review already was available in disability retirement cases, the respondent seizes upon isolated passages in the legislative history in support of its argument that Congress *in fact* was under the impression in 1980 that §8347(c) barred review altogether. See also *post*, at 804–808 (WHITE, J., dissenting). There were, to be sure, references throughout the legislative proceedings to the "present bar to judicial review of disability determinations";[18] the purpose of the amendment frequently was characterized as being "to remove the ban to judicial review of certain disability retirement determinations."[19] These assertions, however, typically were supported by detailed analyses of and quotations from the *Scroggins* line of cases.[20] Because these cases hold that the "bar" extends only to review of the *factual* elements of disability determinations, statements in which *Scroggins* was cited cannot serve to indicate that Congress believed there was an *absolute* bar to judicial review. Rather, the conclusion was that "*expanded* judicial review [of] involuntary disability retirements" was necessary under the provisions of 5 U. S. C. § 7703.[21] The *Scroggins* standard, it was contended, was "so narrow" that it prevented effective judicial review; "a more thorough review would reveal the evidentiary weakness" of many involuntary mental disability retirements.[22]

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[17] OPM continued to oppose provisions in H. R. 2510 that would have provided for *de novo* district court review of MSPB decisions in cases involving involuntary mental disability retirements. See Letter from Alan K. Campbell to Rep. James M. Hanley (May 14, 1980), reprinted in H. R. Rep. No. 96–1080, p. 8 (1980). The Senate Committee on Governmental Affairs successfully proposed that the bill be amended to provide for review in the Court of Claims or the regional courts of appeals pursuant to the standards of 5 U. S. C. §7703. See S. Rep. No. 96–1004, pp. 2–3 (1980). See generally *infra*, at 798–799, and n. 36.

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[18] See, *e. g.*, H. R. Rep. No. 96–1080, at 3.

[19] See, *e. g.*, S. Rep. No. 96–1004, at 1. See also Subcommittee Report, at 1; Subcommittee Hearing, at 4, 11; H. R. Rep. No. 96–1080, at 2–4; S. Rep. No. 96–1004, at 3–4; 126 Cong. Rec. 14815– 14817 (1980) (remarks of Reps. Spellman, Rudd, and Corcoran).

[20] See, *e. g.*, Subcommittee Report, at 14–16, 19–20; Subcommittee Hearing, at 11–12, 20–21, 28; H. R. Rep. No. 96–1080, at 4. See also Subcommittee Report, at 15; Subcommittee Hearing, at 4; H. R. Rep. No. 96–1080, at 8; S. Rep. No. 96–1004, at 4–5; 126 Cong. Rec. 14817-14818 (1980) (Letter from OPM Director Campbell to Rep. James M. Hanley (May 14, 1980), inserted by Rep. Derwinski) (all discussing availability of review for legal and procedural errors).

[21] H. R. Rep. No. 96–1080, at 3.

[22] Subcommittee Report, at 20; Subcommittee Hearing, at 28 (prepared statement of National Federation of Federal Employees).

Largely tracking the respondent's arguments, the dissent consists almost entirely of a patchwork of isolated words and phrases wrenched out of context. At times the dissent's demands appear circular: it dismisses out-

If Congress had intended by the 1980 amendment not only to expand judicial review in mental disability cases beyond the established *Scroggins* standard but to abolish the standard in all other cases as well, there would presumably be some indication in the legislative history to this effect. There is none. Nor, despite Congress' explicit consideration of the *Scroggins* interpretation of § 8347, did Congress amend the wording of the finality clause other than to provide for more expansive review in mental disability cases. "Given that the sole purpose of the amendment was to expand judicial protection of employees through review of factual findings in a certain subset of cases, it hardly follows that Congress negatively implied its intent to strip employees of *Scroggins*-type review in other cases." *Turner* v. *OPM*, 228 U. S. App. D. C. 94, 98, 707 F. 2d 1499, 1503 (1983).

The Federal Circuit nevertheless concluded that the references to *Scroggins* were made by only "some congressmen,"

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right all references to *Scroggins* in the legislative history on the ground that Congress might not have understood *Scroggins* "as a decision holding review available"; in virtually the same breath, it rejects all references to the availability of limited judicial review on the ground that *those* references "nowhere mentio[n] *Scroggins*." *Post*, at 805, n. 4, 808.

The dissent also points to statements during floor debates to the effect that federal employees lacked "access to the courts" and that OPM wished to limit the amendment to "[p]rocedural review," reasoning that if "[p]rocedural review" already was available the amendment "would have made little or no sense." *Post*, at 806, n. 5, 806. As discussed in text, the legislative history as a whole demonstrates that the desired "access" concerned access for *evidentiary* review. See *supra*, at 783–786. Similarly, it was made quite clear during the floor debates that OPM's proposed "[p]rocedural review" would consist of appellate scrutiny on a substantial-evidence basis—which was not available under *Scroggins* and thus not superfluous. See, *e. g.*, 126 Cong. Rec. 14816–14817 (1980) (remarks of Rep. Corcoran). The House rejected OPM's alternative and instead called for full *de novo* review of disability findings; the Senate successfully proposed to eliminate *de novo* review in favor of the substantial-evidence standard. See n. 36, *infra*.

and that the "comments of a few congressmen" are unreliable indicia of congressional intent. 718 F. 2d, at 399–400. The *Scroggins* standard was discussed, not just by "a few congressmen," but by the sponsor of the legislation, the Subcommittee from which it originated, and the House and Senate Committees responsible for its consideration. Similarly, it is contended that the testimony and correspondence of OPM Director Campbell and other agency officials "could not express the intent of Congress." *Id.*, at 399; see also Brief for Respondent 48–49. Yet while Congress' understanding of the enactment is of course our touchstone, in discerning what it was that Congress understood "we necessarily attach 'great weight' to agency representations to Congress when the administrators 'participated in drafting and directly made known their views to Congress in committee hearings.'" *United States* v. *Vogel Fertilizer Co.*, 455 U. S. 16, 31 (1982), quoting *Zuber* v. *Allen*, 396 U. S. 168, 192 (1969). Here the Director and other representatives of OPM described the *Scroggins* standard in detail to both responsible Committees, and relied on the existence of that standard in successfully proposing narrower alternatives to the proposed legislation.[23]

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[23] The dissent would sweep aside this entire legislative history on the basis of some random statements taken out of context. Notwithstanding that the Subcommittee Report spelled out the current availability of *Scroggins* review, for example, the dissent seizes upon one statement by the Subcommittee's Associate Counsel expressing skepticism of OPM's position, and it concludes that the Subcommittee thereby "changed its position on the effect of § 8347(c)" after issuing the Report. *Post*, at 809; see also *post*, at 807. The dissent omits to mention that, during the same testimony, the Associate Counsel *also* (1) observed that under the subsection "'courts are *not as free to review Commission retirement decisions* as they would be if the finality clause were not there,'" (2) criticized the subsection as "*so confining* that even in a case like *[Scroggins]* the employee could not be sustained," and (3) complained that under the *Scroggins* doctrine "people *went to court* in . . . *an almost impossible legal situation.*" Subcommittee Hearing, at 11–12, 18 (emphasis added), quoting *McFarland* v. *United States*, 207 Ct. Cl., at 46, 517 F. 2d, at 942. It is difficult, to say the least, to square such testimony with the dissent's view that it demonstrates Congress' belief that § 8347(c) stood as an "*absolute* preclusion of

The Federal Circuit also reasoned, however, that most of the *Scroggins* line of cases involved involuntary retirements for alleged mental disabilities, and that none was addressed to voluntary disability retirement claims. 718 F. 2d, at 395. The *Scroggins* standard was never restricted solely to involuntary mental disability retirements,[24] however, and the legislative history quite clearly indicates that Congress' understanding was that the *Scroggins* standard applied to disability retirement claims generally.[25]

Finally, it is suggested that prior to 1980 the *Scroggins* standard was little more than ill-considered dicta in that (1) it "had resulted in virtually no reversals of the decisions reached in the administrative process," 718 F. 2d, at 399; (2) courts invoking *Scroggins* had never "consider[ed] the matter in any depth," Brief for Respondent 42; and (3) the *Scroggins*

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judicial review"—let alone that the Subcommittee "changed its position on the effect of § 8347(c)." *Post*, at 804, 809 (emphasis added).

Similarly, the dissent dismisses the relevance of OPM's repeated assurances that limited review already was available and Congress' narrowing of the amendment in response to these representations. The dissent thinks it unclear whether OPM's references were to "*judicial* review at all," reasoning that "for all that appears" the agency's assurances "may have been referring to the review of OPM decisions available in the MSPB." *Post*, at 808–809. This reasoning is curious given that OPM's representations (1) separately discussed the availability of full *de novo* review from the MSPB, and (2) were *explicitly* addressed to the questions of whether and to what extent "*judicial* review" should be "expanded" beyond current practice. See, *e. g.*, Letter from Alan K. Campbell to Rep. James M. Hanley (May 14, 1980), reprinted in H. R. Rep. No. 96–1080, at 8 (emphasis added).

[24] Courts had exercised *Scroggins* review in several physical disability cases. See, *e. g.*, *Polos* v. *United States*, 223 Ct. Cl., at 558–563, 621 F. 2d, at 390–393; *Allen* v. *United States*, 215 Ct. Cl., at 529–533, 571 F. 2d, at 17–19; *Lech* v. *United States*, 187 Ct. Cl., at 476, 409 F. 2d, at 255. Moreover, courts had never cast the *Scroggins* standard in terms of the circumstances of the retirement claim, but rather in terms of judicial authority under the Retirement Act to exercise limited review over disability retirement claims generally. See n. 14, *supra*.

[25] See, *e. g.*, Subcommittee Report, at 15; Subcommittee Hearing, at 4; H. R. Rep. No. 96–1080, at 8; S. Rep. No. 96–1004, at 4–5; 126 Cong. Rec. 14817–14818 (1980).

standard was wrong from the outset and "[w]hat did not properly exist cannot be expanded," 718 F. 2d, at 399. See also *post*, at 802, n. 2 (WHITE, J., dissenting) ("The so-called *Scroggins* doctrine apparently is the product of frequent repetition of the *Scroggins* court's dictum"). Each of these assertions is either erroneous or misses the mark. That courts applying *Scroggins* had almost never reversed agency decisions is a testament to *Scroggins*' narrow compass, not to its insubstantiality.[26] A fair reading of the cases demonstrates that the courts carefully articulated the standard to begin with, and reaffirmed its vitality only after measured reconsideration.[27] And whether or not *Scroggins* was correctly decided is largely inapposite to the question at hand. "For the relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the state of the law was." *Brown* v. *GSA*, 425 U. S. 820, 828 (1976).[28]

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[26] Courts did not advance the standard as dicta, but instead invoked it as authority for exercising jurisdiction to review agency decisions in disability retirement cases. After conducting such review, courts almost always concluded that the alleged error of law or procedure did not warrant reversal. See cases cited in n. 14, *supra*. But see *Polos* v. *United States*, *supra*, at 564–565, 621 F. 2d, at 391–392 (remanding case to OPM after finding errors of law); *Allen* v. *United States*, *supra*, at 533, 571 F. 2d, at 19 (reversing Civil Service Commission denial of annuity).

[27] See cases cited in n. 14, *supra*. Prior to the 1980 amendment, the Government had argued before the Court of Claims that *Scroggins* was erroneously decided, but after further consideration the court rejected the Government's contention and reaffirmed the *Scroggins* interpretation of § 8347(c). *Fancher* v. *United States*, 218 Ct. Cl., at 510, n. 3, 588 F. 2d, at 806, n. 3.

[28] The reliance by the respondent and the dissent on *United States* v. *Erika, Inc.*, 456 U. S. 201 (1982), is inapposite. See *post*, at 801, n. 1. *Erika* held that the Medicare statute bars judicial review of certain administrative decisions concerning reimbursement to health care providers. Although there was no explicit statutory bar to judicial review of such decisions, we concluded that "[i]n the context of the statute's precisely drawn provisions" the omission of a review provision "provides persuasive

The Federal Circuit therefore erred in concluding that § 8347, as amended, altogether bars judicial review of MSPB decisions in retirement disability cases. Accordingly, while the factual underpinnings of § 8347 disability determinations may not be judicially reviewed, such review is available to determine whether "there has been a substantial departure from important procedural rights, a misconstruction of the governing legislation, or some like error 'going to the heart of the administrative determination.'" *Scroggins* v. *United States*, 184 Ct. Cl., at 534, 397 F. 2d, at 297.

III

The respondent contends that, even if *Scroggins* review is available, the Court of Appeals for the Federal Circuit has no jurisdiction directly to review MSPB disability retirement decisions except as provided in § 8347(d)(2). Instead, the respondent argues, retirees such as Lindahl whose administrative appeals are rejected by the MSPB must file a Tucker Act suit in a district court pursuant to 28 U. S. C. § 1346(a)(2) or in the Claims Court pursuant to 28 U. S. C. § 1491(a), after which the judgment can be appealed to the Federal Circuit pursuant to 28 U. S. C. § 1295(a)(2) or (a)(3), respectively. In other words, the respondent contends that most retirees may not obtain direct Federal Circuit review of MSPB decisions, but must instead surmount a two-step judicial review process—with a trial court initially conducting the nonevidentiary *Scroggins* review, followed by the Federal Circuit conducting the identical review all over again.

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evidence that Congress deliberately intended to foreclose further review of such claims." 456 U. S., at 208. The instant case, on the other hand, involves an ambiguous preclusion provision and the interplay of several statutes that are hardly "precise." See *infra*, at 793–794. More significantly, we found in *Erika* that the legislative history "confirm[ed]" Congress' intent absolutely to preclude review and "explain[ed] its logic." 456 U. S., at 208. In this case, on the other hand, the legislative history compels exactly the opposite conclusion.

In addition to making no apparent sense as a matter of sound judicial administration, this argument does not accord with the jurisdictional framework established by the CSRA and the FCIA. Title 28 U. S. C. § 1295(a) provides: "The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction . . . (9) of an appeal from a final order or final decision of the Merit Systems Protection Board, pursuant to sections 7703(b)(1) and 7703(d) of title 5." Title 5 U. S. C. § 7703(b)(1) in turn provides that, except for discrimination cases covered by subsection (b)(2), "a petition to review *a final order or final decision of the Board* shall be filed in the United States Court of Appeals for the Federal Circuit" (emphasis added).[29] Sections 1295(a)(9) and 7703(b)(1) together appear to provide for exclusive jurisdiction over MSPB decisions in the Federal Circuit, and do not admit any exceptions for disability retirement claims.

The respondent argues, however, that § 7703(b)(1) can only properly be understood by reference to § 7703(a)(1), which provides that "[a]ny employee or applicant for employment" may obtain judicial review of MSPB decisions and orders. Contending that former employees are not "employees" within the meaning of § 7703(a)(1), the respondent advances two grounds in support of its argument that the jurisdictional grant of § 7703(b)(1) is limited to appeals authorized by § 7703(a)(1). First, it seems to assert that § 7703(a)(1) is *itself* the operative jurisdictional grant, because it repeatedly contends that § 7703(b)(1) "appears to be nothing more than a venue provision." Brief for Respondent 22; see also *id.*, at 29. This argument wholly misperceives the statutory framework. Section 7703(a)(1) creates a right of review for "employee[s]" and "applicant[s] for employment," but is not addressed to subject-matter jurisdiction at all. Section 7703(b)(1) confers the operative grant of jurisdiction—the "power to adjudicate"—and is not in any sense a "venue" provision.[30] The fact that § 7703(a)(1) provides one action for review under the jurisdiction of § 7703(b)(1) does not preclude the possibility of other actions for review that similarly would fall within the jurisdictional perimeters of § 7703(b)(1).

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[29] Title 5 U. S. C. § 7703(b)(2) provides that cases of discrimination shall be filed in either a district court or the Claims Court, depending on which antidiscrimination statute is at issue; the plaintiff is guaranteed the right to a *de novo* trial in such cases, § 7703(c). Section 7703(d), the other jurisdictional provision referred to in 28 U. S. C. § 1295(a)(9), provides that a petition by the Director of the OPM to review an adverse MSPB decision may be filed in the Federal Circuit, and sets forth the circumstances in which the Director may seek such review.

Second, the respondent contends that the CSRA, which initially enacted § 7703(b)(1), was addressed primarily to adverse actions against employees and applicants for employment and that Congress did not intend, in either the CSRA or the FCIA, to extend the direct review mechanism beyond MSPB decisions involving such matters. There is no question that Congress' primary focus in the CSRA was on adverse actions, and there are numerous references throughout the legislative history to § 7703 as a mechanism for review of adverse actions.[31] These legislative references, combined with the proximity of § 7703(a)(1) and § 7703(b)(1), might be read as limiting the latter to the terms of the former. But as numerous lower courts have noted, "[i]n the process of drafting a comprehensive scheme of reform Congress failed to address specifically how the mechanics of the [CSRA] would function in certain situations," and the judicial task therefore is to "'look to the provisions of the whole law, and to its object and policy.'" *Meyer* v. *Department of HHS*, 229 Ct. Cl. 151, 153–154, 666 F. 2d 540, 542 (1981), quoting *Richards* v. *United States*, 369 U. S. 1, 11 (1962). When construing these arguably ambiguous provisions, our duty is "to remain faithful to the central congressional purposes underlying the enactment of the CSRA." *Devine* v. *White*, 225 U. S. App. D. C. 179, 183, 697 F. 2d 421, 425 (1983). A review of the policies and purposes of the CSRA and FCIA demonstrates that the terms of § 7703(b)(1) and 28 U. S. C. § 1295(a)(9) should not be limited by an implied jurisdictional restriction for disability retirement cases.

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[30] Venue provisions come into play only after jurisdiction has been established and concern "the place where judicial authority may be exercised"; rather than relating to the power of a court, venue "relates to the convenience of litigants and as such is subject to their disposition." *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*, 308 U. S. 165, 168 (1939). Compare, *e. g.*, 28 U. S. C. § 1331 (grant of general federal-question jurisdiction to district courts) with § 1391 (venue for exercise of such jurisdiction). See generally 15 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3801 (1976).

[31] See, *e. g.*, S. Rep. No. 95–969, pp. 62–63 (1978); H. R. Rep. No. 95–1403, pp. 22–23 (1978).

As originally enacted by Congress in the CSRA, § 7703(b)(1) provided that jurisdiction over appeals from MSPB final decisions would rest either in the Court of Claims, pursuant to the Tucker Act, or in the regional courts of appeals, pursuant to 28 U. S. C. § 2342(6) (1976 ed., Supp. V). See 5 U. S. C. § 7703(b)(1) (1976 ed., Supp. V). The House version of the bill had provided for jurisdiction in either the Court of Claims or the district courts, but the Conference Committee substituted review in the courts of appeals because it believed "the traditional appellate mechanism for reviewing final decisions and orders of Federal administrative agencies" would best promote efficient review of MSPB actions. H. R. Conf. Rep. No. 95–1717, p. 143 (1978). See also S. Rep. No. 95–969, p. 62 (1978). And although most of the detailed discussion of judicial review was addressed to adverse actions, it was emphasized that § 7703(b)(1)'s "traditional appellate mechanism" would apply to "adverse actions, such as removals, *and other appealable actions taken by an agency*." *Id.*, at 51 (emphasis added). Section 7703 was described as governing "judicial review of *all* final orders or decisions of the Board." *Id.*, at 62.[32] Moreover, the Senate

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[32] See also S. Rep. No. 95–969, at 29 ("Action by the Merit Systems Protection Board, following any hearing or adjudication *on any matter falling within its jurisdiction*, constitutes final agency action for the purposes of judicial review") (emphasis added).

Report explicitly identified certain nonadverse action appeals that would not be encompassed by § 7703(b)(1); it emphasized, for example, that "Board decisions and orders (other than those involving discrimination complaints and *determinations concerning life and health insurance*) [shall] be reviewable" under the jurisdiction conferred by that subsection. *Id.*, at 63 (emphasis added). Life and health insurance cases are not adverse action matters, and they continue to be reviewed under separate jurisdictional grants set forth at 5 U. S. C. § 8715 and § 8912. We believe the inference is strong, given that disability retirement decisions were not included in this enumeration of exceptions, that Congress did not intend for such decisions to fall outside the all-encompassing provisions of § 7703(b)(1).

In the FCIA, Congress amended § 7703(b)(1) to combine portions of the jurisdiction of the Court of Claims and the regional courts of appeals into one centralized court, the Court of Appeals for the Federal Circuit. The Court of Claims previously had exercised its jurisdiction under 28 U. S. C. § 1491 both as an appellate tribunal and as a trial court.[33] As explained by the Senate Report, the purpose of the FCIA was to consolidate the "government claims case[s] and all other *appellate matters* that are now considered by the . . . Court of Claims" pursuant to its § 1491 Tucker Act jurisdiction with civil service appeals considered by the regional courts of appeals. S. Rep. No. 97–275, p. 6 (1981) (emphasis added). The result, both Houses emphasized, would be that the new Federal Circuit would have "jurisdiction of *any* appeal from a final order or final decision of the Merit Systems Protection Board." *Id.*, at 21 (emphasis added). See also H. R. Rep. No. 97–312, p. 18 (1981) (Federal Circuit to have jurisdiction "over all appeals from the Merit Systems Protection Board").

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[33] From 1925 until the Court of Claims was abolished by the FCIA, the court's trial function was performed by a "Trial Division" consisting of commissioners appointed by the Court of Claims Article III judges; in any matter requiring *de novo* factfinding a commissioner presided over the trial and made findings of fact and recommendations of law which were then reviewed by the "Appellate Division," consisting of the judges themselves. In those matters not requiring factfinding, a case typically was routed directly to a panel of the court, which conducted review comparable to that of an appellate court. For further discussion of this bifurcation, see Cowen, Nichols, & Bennett, The United States Court of Claims: A History, Part II, pp. 90–95, 131–133 (1978, published in 216 Ct. Cl.); Bar Association of the District of Columbia, Manual for Practice in the United States Court of Claims 5–8, 71–73 (1976); H. R. Rep. No. 97–312, p. 24 (1981); S. Rep. No. 97–275, pp. 7–8 (1981).

The FCIA also created a new Claims Court that would continue to exercise general Tucker Act jurisdiction; that court would "inheri[t]" the Court of Claims' "trial jurisdiction" under § 1491. S. Rep. No. 97–275, at 7; H. R. Rep. No. 97–312, at 24. With the exception of changing the name of the relevant court, however, Congress did not amend the language of § 1491, under which the Court of Claims previously had exercised both trial and appellate functions. The result is that the appellate jurisdiction of the new Federal Circuit appears to overlap with the residuary trial jurisdiction of the Claims Court. For example, although neither party has addressed the import of this language, there remains in § 1491(a)(2) an explicit reference to the Claims Court's authority to "issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records." Similarly, the legislative history of the FCIA contains references to military and civilian pay disputes being channeled to the Federal Circuit, see H. R. Rep. No. 97–312, at 19; S. Rep. No. 97–275, at 6, as well as to such disputes remaining as part of the Claims Court's jurisdiction, H. R. Rep. No. 97–312, at 24.

In light of this ambiguity and the apparent jurisdictional overlap, we must resort to a functional analysis of the role of these different courts and to a consideration of Congress' broader purposes. See *supra*, at 793–794. It seems clear to us that Congress in the FCIA intended to channel those

Tucker Act cases in which the Court of Claims performed an appellate function—such as traditional review of agency action based on the agency record—into the Federal Circuit, and to leave cases requiring *de novo* factfinding in the Claims Court and district courts.[34] Congress in the CSRA had explicitly provided for the "traditional appellate mechanism" for review of MSPB decisions, H. R. Conf. Rep. No. 95–1717, at 143, and we have interpreted similar jurisdictional grants precisely so as to carry out Congress' intent to promote the "sound polic[ies]" of placing agency review in the courts of appeals. *Florida Power & Light Co.* v. *Lorion*, *ante*, at 745; see also *Harrison* v. *PPG Industries, Inc.*, 446 U. S. 578, 593 (1980). Review of an MSPB order involving a disability retirement claim not only is explicitly encompassed in the Federal Circuit's jurisdiction, but also makes logical sense given that the court considers only legal and procedural questions and does not review the factual bases of the administrative decision.

A contrary conclusion would result in exactly the sort of "duplicative, wasteful and inefficient" judicial review that Congress in the CSRA and the FCIA intended to eradicate.[35] The CSRA and the FCIA quite clearly demonstrate that Congress intended to abolish the needless practice of reviewing civil service actions on the same criteria at two judicial levels. The Senate Report on the FCIA, for example, emphasized that direct appeal to the Federal Circuit would "improv[e] the administration of the [judicial] system by reducing the number of decision-making entities." S. Rep. No. 97–275, at 3. Similarly, the Senate Report on the CSRA emphasized that trial-level review of agency action was "appropriate" only where "additional fact-finding" was necessary, and that in all other cases direct appellate review would "merely eliminat[e] an unnecessary layer of judicial review." S. Rep. No. 95–969, at 52, 63.

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[34] This functional bifurcation of the Court of Claims' Tucker Act jurisdiction was repeatedly emphasized. See, *e. g.*, H. R. Rep. No. 97–312, at 17–19, 24 ("[T]he Claims Court essentially will have the same jurisdiction that the Court of Claims now exercises through its Trial Division under the Tucker Act, 28 U. S. C. § 1491, together with the authority to enter final judgment"); S. Rep. No. 97–275, at 2 (Claims Court the "new article I trial forum"), 22.

[35] Vaughn, Civil Service Discipline and Application of the Civil Service Reform Act of 1978, 1982 Utah L. Rev. 339, 369. The two-stage process of reviewing personnel actions first in a trial court and then in an appellate court, with both courts employing the same standards in reviewing the administrative record, had been criticized as "serv[ing] no visible purpose," contributing to "over-crowded dockets in all courts," and impeding the ability of courts "to give, efficiently and expeditiously, the most appropriate kind of relief." *Adams* v. *Laird*, 136 U. S. App. D. C. 388, 392, n. 2, 420 F. 2d 230, 234, n. 2 (1969), cert. denied, 397 U. S. 1039 (1970); *Scott*

The respondent has skillfully parsed the legislative history and culled every possible nuance and ambiguity, but it has failed to advance a single argument why Congress would have intended to depart from the plain jurisdictional language in cases of disability retirement appeals and to require instead that such appeals be reviewed for legal and procedural error first by the Claims Court or a district court, and then all over again by the Federal Circuit. That Congress could not have intended such a wasteful exercise is reinforced by § 8347(d)(2), which explicitly provides that one subclass of disability retirement cases—those involving involuntary dismissals based on an individual's alleged mental disability—are appealable directly from the MSPB to the Federal Circuit.[36] We can discern no reason why Congress would have

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v. *Macy*, 131 U. S. App. D. C. 93, 96, n. 6, 402 F. 2d 644, 647, n. 6 (1968); *Connelly* v. *Nitze*, 130 U. S. App. D. C. 351, 352, n. 1, 401 F. 2d 416, 417, n. 1 (1968). See also R. Vaughn, Principles of Civil Service Law § 5.4(1) (1976) (discussing uncertain and overlapping jurisdictional bases for judicial review of civil service matters); Johnson & Stoll, Judicial Review of Federal Employee Dismissals and Other Adverse Actions, 57 Cornell L. Rev. 178, 188–197 (1972); Vaughn, The Opinions of the Merit Systems Protection Board: A Study in Administrative Adjudication, 34 Admin. L. Rev. 25, 29, nn. 29–30 (1982); Developments in the Law—Public Employment, 97 Harv. L. Rev. 1611, 1642–1643 (1984).

[36] The original House version of the 1980 amendment had provided for review of MSPB decisions in such cases by the district courts or the Court

intended that mental disability cases, which permit for evidentiary review, be channeled to an appellate forum, while intending that other retirement cases, which permit only for *Scroggins* review, be channeled to a trial forum for nonevidentiary review and then to the Federal Circuit for performance of the identical review. Moreover, as Judge Nichols suggested in his concurrence below, 718 F. 2d, at 400, there frequently will be disputes—as in this case—as to whether an employee's retirement was involuntary or voluntary, and accordingly as to whether the appeal might properly be characterized as an adverse action rather than as a simple disability retirement matter. See n. 38, *infra.* In the absence of any indication in the legislative history or persuasive functional argument to the contrary, we cannot assume that Congress intended to create such a bizarre jurisdictional patchwork.[37] Accordingly, we conclude that MSPB decisions concerning retirement disability claims are reviewable in the first instance by the Federal Circuit pursuant to the jurisdictional grants in 5 U. S. C. § 7703(b)(1) and 28 U. S. C. § 1295(a)(9).[38]

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of Claims. The Senate Committee on Governmental Affairs successfully proposed to amend the legislation to incorporate the traditional appellate review model, reasoning that "[s]ince full de novo review is now provided before the Merit Systems Protection Board, it would be cumbersome and inappropriate to provide for a second de novo review in the United States district court." S. Rep. No. 96–1004, at 3.

[37] Cf. *Crown Simpson Pulp Co.* v. *Costle*, 445 U. S. 193, 197 (1980) ("Absent a far clearer expression of congressional intent, we are unwilling to read the Act as creating such a seemingly irrational bifurcated system").

[38] Lindahl and various *amici* have argued that a retired federal employee should be considered in at least some circumstances to be an "employee" within the meaning of 5 U. S. C. § 7701 and § 7703(a)(1), and accordingly offer additional jurisdictional analyses based on the asserted applicability of these provisions. The respondent has devoted much of its briefing to an effort at demonstrating that §§ 7701 and 7703(a)(1) do not apply "to *any* retirement actions." Brief for Respondent 24 (emphasis in original). The Federal Circuit in *Bronger* v. *OPM*, 740 F. 2d 1552, 1554–1556 (1984), has held that a retired employee filing for an annuity may in at least some circumstances be considered an "employee" within the meaning of

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE WHITE, with whom THE CHIEF JUSTICE, JUSTICE REHNQUIST, and JUSTICE O'CONNOR join, dissenting.

Title 5 U. S. C. § 8347(c) states:

> "The Office [of Personnel Management] shall determine questions of disability and dependency arising under this subchapter. Except to the extent provided under subsection (d) of this section, the decisions of the Office concerning these matters are final and conclusive and are not subject to review."

The majority concedes that in cases like petitioner's, subsection (d) of 5 U. S. C. § 8347 provides only for review of OPM's decisions by the Merit Systems Protection Board (MSPB). Nonetheless, the majority concludes that notwithstanding the review preclusion provision of § 8347(c), petitioner is entitled to judicial review of the denial of his claim for disability retirement benefits. In the view of the majority, § 8347(c) must be interpreted to preclude judicial review only of OPM's factual determinations, not of questions of law. Because I consider the exercise in statutory construction that supports this conclusion fundamentally unsound, I dissent.

The majority begins by asserting that the language of the statute is ambiguous, as it "quite naturally can be read as precluding review only of OPM's *factual* determinations about 'questions of disability and dependency.'" *Ante,* at 779. With all due respect, I confess that I cannot understand how one can "quite naturally" read a provision precluding review of *decisions* concerning "questions of disability . . . arising under this subchapter" to apply only to *factual findings* of disability. Had Congress intended to preclude review only of factual findings, it seems unlikely that it would have employed the much more comprehensive term "decisions." The statute strikes me as ambiguous only in the sense that any statement may be termed "ambiguous" on the theory that the utterer may have meant something other than what he said. Such a nihilistic view of linguistic interpretation may be fashionable in some circles, but it hardly provides an adequate basis for statutory construction. A more conventional reading of the statute—one that takes as its starting point the plain meaning of the statutory language—would leave little alternative to rejecting petitioner's argument that OPM's denial of his claim for disability benefits is judicially reviewable.[1]

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§ 7703(a)(1). See also *Chavez* v. *OPM*, 6 M. S. P. B., at 348 (retired employee considered an "employee" for purposes of § 7701 administrative review procedures over OPM disability retirement denial). Our resolution of the instant case does not require that we consider whether and under what circumstances a retired employee filing for a disability annuity may ever be considered an "employee" for purposes of § 7701 or § 7703(a)(1), and we express no views on that issue.

Having declared the statute's language ambiguous, however, the majority seeks to bolster its interpretation through resort to the legislative history. The legislative history relied upon, however, is not that of the Congress that originally enacted the preclusion provision, for that history, as the majority concedes, provides no hint that the statute does not mean what it says. Instead, the majority examines the legislative history of the 1980 amendments to § 8347, which created an exception to § 8347(c)'s preclusion of judicial review—an exception limited to involuntary mental disability cases. One would normally believe that by creating an express exception to the rule precluding judicial review while maintaining the bar to review in all other cases, Congress would have underscored rather than undermined the force of § 8347(c). The contrary contention is that in "revisiting" § 8347, Congress implicitly ratified the so-called *Scroggins* doctrine, under which disability determinations of the OPM and its predecessor, the Civil Service Commission, were held by the Court of Claims to be reviewable for procedural error notwithstanding § 8347(c).[2] In relying on this history, the majority purports to be applying the canon of statutory construction articulated in *Lorillard* v. *Pons*, 434 U. S. 575 (1978):

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[1] The majority suggests that Congress ordinarily is more explicit when it seeks to preclude review altogether. *Ante,* at 779–780. But this argument was ruled out by our decision in *United States* v. *Erika, Inc.,* 456 U. S. 201 (1982), in which we held that preclusion of review could be inferred from Congress' failure to provide explicitly for review. The majority attempts to distinguish *Erika* on the ground that Congress' *silence* in the statute under consideration there was less ambiguous than its affirmative preclusion of review in the statute at issue here. *Ante,* at 790–791, n. 28. Such argumentation is, to put it mildly, unconvincing.

> "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change . . . . So too, where . . . Congress adopts a new law incorporating sections of a prior law, Congress nor-

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[2] *Scroggins* v. *United States*, 184 Ct. Cl. 530, 397 F. 2d 295, cert. denied, 393 U. S. 952 (1968), is an unlikely source for the doctrine that disability decisions are reviewable. In *Scroggins*, the Court of Claims stated that under § 8347(c), *"at best,* a court can set aside the Commission's determination 'only where there has been a substantial departure from important procedural rights, a misconstruction of the governing legislation, or some like error "going to the heart of the administrative determination."'" *Id.*, at 534, 397 F. 2d, at 297 (emphasis added). The court went on to hold that it had no power to overturn the Civil Service Commission's decision to retire an employee against his will on mental disability grounds notwithstanding that the decision lacked any evidentiary support. The so-called *Scroggins* doctrine apparently is the product of frequent repetition of the *Scroggins* court's dictum regarding the circumstances under which it might have the power to review a disability decision. As the majority points out, reversal under the *Scroggins* formula was, at least as of 1980, virtually unheard of. See *ante*, at 790, and n. 26.

> mally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." *Id.*, at 580–581.

Of course, neither *Lorillard* nor the authorities it cites are directly relevant here, for Congress did not "re-enact" the review preclusion in the 1980 legislation, nor did it "incorporate" the language of § 8347(c) in a new statute; rather, it left § 8347(c) intact and created a specific new exception to its preclusion of review. In creating this exception, which was designed solely as a remedy for the perceived problem of misuse by federal agencies of involuntary mental disability retirement proceedings to rid themselves of unpopular employees, Congress can hardly be said to have "adopted" any interpretation of the preclusion provision that it left untouched. Even if Congress was aware of the construction placed upon § 8347(c) by the Court of Claims, its inaction in the face of that construction is an unsatisfactory basis on which to rest the majority's interpretation of the statute. See, *e. g.*, *Aaron* v. *SEC*, 446 U. S. 680, 694, n. 11 (1980).[3]

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[3] Faced with a question of the proper construction of § 10(b) of the Securities Exchange Act of 1934, the Court in *Aaron* rejected a line of argument almost identical to that which it accepts today:

"The Commission finds further support for its interpretation . . . in the fact that Congress was expressly informed of the Commission's interpretation on two occasions when significant amendments to the securities laws were enacted . . . and on each occasion Congress left the administrative interpretation undisturbed. . . . But, since the legislative consideration of those statutes was addressed principally to matters other than that at issue here, it is our view that the failure of Congress to overturn the Commission's interpretation falls far short of providing a basis to support a construction of § 10(b) so clearly at odds with its plain meaning and legislative history." 446 U. S., at 694, n. 11.

I do not suggest that Congress' inaction in the face of an authoritative statutory interpretation brought to its attention is never probative of the proper interpretation of the statute. In *Bob Jones University* v. *United States*, 461 U. S. 574 (1983), for example, the Court based its acceptance of

There is no basis in the legislative history for concluding that Congress endorsed *Scroggins* review in cases subject to § 8347(c): that history indicates with reasonable clarity that Congress believed that the exception it was creating in § 8347(d)(2) was an exception to an otherwise absolute preclusion of judicial review. The Committee Reports describing the legislation amending § 8347 nowhere indicate any congressional recognition of the possibility that under § 8347 as it then existed, limited judicial review of OPM's disability decisions might be available. The House Report speaks in categorical terms of § 8347(c)'s "bar to judicial review," H. R. Rep. No. 96-1080, p. 3 (1980), while the Senate Report refers to the "bar to any review of OPM's decisions on disability," S. Rep. No. 96-1004, p. 3 (1980). And although, as the majority points out, the House Report does contain a discussion of the *Scroggins* decision and of two other Court of Claims decisions that the majority classes as following *Scroggins*, the Report's discussion evinces no belief that *Scroggins* permits any form of judicial review. Rather, the Report excoriates *Scroggins* and its progeny as extreme examples of the pernicious effects of precluding judicial review of involuntary mental disability retirement cases.[4] The Committee Reports

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the Internal Revenue Service's interpretation of § 501(c)(3) of the Internal Revenue Code in part on Congress' failure to repudiate that interpretation. The Court emphasized, however, that its decision to rely on legislative nonaction as a guide to the statute's meaning was justified because of Congress' "prolonged and acute awareness" of the IRS interpretation, which had been brought to Congress' attention by legislation designed to overturn it at least 13 times in the space of a dozen years. *Id.*, at 600-601. The Court cautioned that "[o]rdinarily, and quite appropriately, courts are slow to attribute significance to the failure of Congress to act on particular legislation." *Id.*, at 600.

[4] The House Report stated:

"Under present law disability determinations are not subject to review (*see*, 5 U. S. C. 8347(c)). The committee was made aware of the adverse effect of this bar to judicial review by two Court of Claims decisions issued on June 14, 1968, in two psychiatric disability retirement cases. These cases were *McGlasson* v. *United States*, 397 F. 2d 303 (1968), and thus represent a different interpretation of *Scroggins* than that offered by the majority; they by no means suggest that anyone in Congress believed that in leaving the § 8347(c) bar to review intact in all cases other than involuntary mental disability retirement cases, Congress would be endorsing the view that § 8347(c) permitted limited judicial review in all of those other cases.

The discussion on the House floor of the bill amending § 8347 provides a further indication that Congress did not believe § 8347(c) permitted any judicial review at all in cases to which it applied. Representative Spellman, who chaired the Committee that reported the bill, explained that the provision allowing judicial review of involuntary mental disability retirement cases was necessary because "MSPB's decision in these cases currently are *[sic]* final and not subject to court review." 126 Cong. Rec. 14815 (1980).[5] The follow-

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Scroggins v. *United States*, 397 F. 2d 295 (1968)." H. R. Rep. No. 96-1080, at 4.

The majority suggests that because *Scroggins* and its progeny in fact held that limited judicial review was available under § 8347(c), "statements in which *Scroggins* was cited cannot serve to indicate that Congress believed there was an *absolute* bar to judicial review." *Ante*, at 786. The fallacy in this argument is obvious: it assumes that Congress read *Scroggins* the same way the majority reads it today. The Committee Report, however, indicates that this assumption is unwarranted: in its Report to the full House, the Committee presented the *Scroggins* decision as an instance of the preclusion of review, not as a decision holding review available. That this may not have been an entirely accurate view of *Scroggins* is of course irrelevant, for under the majority's approach to the interpretation of this statute, "the relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the state of the law was." *Brown* v. *GSA*, 425 U. S. 820, 828 (1976), quoted *ante*, at 790. In any event, the Committee's apparent interpretation of *Scroggins* as a review preclusion case rather than a case actually establishing the existence of a form of judicial review is by no means unwarranted. See n. 2, *supra*.

[5] Representative Spellman, in her prepared statement explaining the purpose of the bill, also remarked that "OPM would support H. R. 2510 if the judicial review were limited to procedural questions involving these

ing colloquy then took place between Representative Spellman and Representative Rudd:

> "Mr. RUDD: Mr. Speaker, I would simply like to ask a couple of questions of the gentlewoman from Maryland about this legislation.
>
> "I think recourse to the courts is always available for wrongs that have been committed, but apparently this makes it a little easier for a judicial review of an employee-employer relationship decision. Is that correct?
>
> . . . . .
>
> "Mrs. SPELLMAN: I would like to explain to the gentleman from Arizona that unfortunately access to the courts is not available to these employees at this time.
>
> "Mr. RUDD: My question is that this legislation would expedite it, so to speak?
>
> "Mrs. SPELLMAN: Exactly. The gentleman is absolutely right.
>
> "Mr. RUDD: With the understanding that the courts are always available for wrongs that have been committed, for equity, for justice, with this addition to the legislation, would that be in the way of an intimidation to the employer, a Federal employer?
>
> "Mrs. SPELLMAN: No; I guess I did not make it clear. For employees today who are asked to take fitness-for-duty exams and are found to be unfit for duty, even based upon a telephone call with a psychiatrist, they do not have access to the courts. The law precludes them from having that access today. What we are attempting to do is treat them like citizens of the

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disability decisions rather than questions of both procedure and the medical facts of the case." 126 Cong. Rec. 14816 (1980). Procedural review, of course, is precisely what the majority contends was already available despite § 8347(c). Representative Spellman's remark, however, would have made little or no sense if she had shared this view.

> United States of America should be treated, opening up that review by the court." *Id.*, at 14817.

Representative Spellman's status as the Chairman of the Committee that authored the amendments to § 8347 gives her explanation of what those amendments were intended to accomplish some authority. See, *e. g.*, *Train* v. *Colorado Public Interest Research Group*, 426 U. S. 1, 14–17 (1976); *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443, 475 (1921). Her remarks on the floor are unequivocal indications that those who wrote the bill amending § 8347 perceived it to create an exception to an otherwise unqualified bar to judicial review. Spellman's explanation of the bill substantially undermines the plausibility of the majority's conclusion that in leaving the § 8347(c) bar in place for all cases other than involuntary mental disability cases Congress believed it was leaving open the possibility of limited judicial review in cases to which § 8347(c) applied.

The majority insists that Congress believed limited review to be available under § 8347(c) because OPM told it that that was the case. This conclusion in large part is based on the testimony of an OPM representative before the House Subcommittee that initially drafted the legislation that, as amended, ultimately emerged as the bill amending § 8347. The OPM representative informed the members of the Subcommittee that judicial review for procedural error was not barred by § 8347(c). What the majority fails to mention is that this testimony was immediately followed by a statement from the Subcommittee's own Associate Counsel, who stated:

> "It is the subcommittee position that litigation is necessary even though the previous witness talked about employees not needing any further access to the courts because procedural issues are already taken up on a due process basis by the courts without any special legislation.

> "This is a fairly decent theory except the Court of Claims doesn't agree." Hearing on H. R. 2510 et al. before the Subcommittee on Compensation and Employee Benefits of the House Committee on Post Office and Civil Service, 96th Cong., 1st Sess., 11 (1979) (statement of Thomas R. Kennedy, Associate Counsel, Subcommittee on Investigations).

The witness then proceeded to provide his own analysis of the *Scroggins* line of cases, the gist of which was that § 8347(c) effectively barred any judicial review of OPM's disability decisions. The Subcommittee hearings thus provide a slim basis for the notion that Congress believed that limited review was permitted by § 8347(c)—indeed, to the extent that the hearings suggest anything, it is that Congress believed § 8347(c) meant just what it said.

The majority also places heavy emphasis on two letters written by the Director of OPM to the House and Senate Committees considering the amendments to § 8347. Each letter contains the statement that OPM believed that "[i]t is appropriate . . . that OPM decisions on voluntary applications be conclusive, reviewable only to determine whether there has been a substantial procedural error, misconstruction of governing legislation, or some like error going to the heart of the administrative determination." Letter from Alan K. Campbell to Rep. James M. Hanley (May 14, 1980), reprinted in H. R. Rep. No. 96–1080, p. 8 (1980); Letter from Alan K. Campbell to Sen. Abraham A. Ribicoff (Sept. 25, 1980), reprinted in S. Rep. No. 96–1004, p. 4 (1980). Because this language tracks the description of judicial review under the so-called *Scroggins* formula, the majority urges that these letters put Congress on notice that such review was permitted under § 8347(c). But the Campbell letters nowhere mention *Scroggins* or state that what Campbell believed to be appropriate was in fact the law. Nor, indeed, do the letters indicate that the limited form of review Campbell believed appropriate in voluntary disability cases was *judicial* review at all: for all that appears, the letters may have been referring to the review of OPM decisions available in the MSPB.[6] The oblique reference to review of voluntary disability claims in the Campbell letters is insufficient to establish that Congress believed that its passage of the amendments to § 8347 constituted an endorsement of *Scroggins* review.

The only evidence the majority can point to that suggests that anyone in or connected with Congress believed in the existence of *Scroggins* review is the 1978 Subcommittee Report discussed *ante*, at 783. The author of this Committee print did take the position that § 8347(c) permitted some review—albeit severely limited review—of the Civil Service Commission's disability decisions. I doubt, however, that the interpretation of § 8347(c) advanced in a 1978 Committee print can be attributed to the Congress that amended § 8347 two years later. In the intervening period, the Subcommittee's staff apparently changed its position on the effect of § 8347(c), see *supra*, at 807–808, and the Committee Reports on the bill amending § 8347—particularly when read in light of Representative Spellman's explanatory remarks on the House floor—leave the definite impression that the House and Senate Committees that reported the bill believed the bar in § 8347(c) to be absolute.

The majority's approach, then, amounts to this. A farfetched reading of a reasonably clear statute is posited. On the strength of this "ambiguity," resort is had to the legislative history, not of the enacting Congress, but of a Congress nearly three decades later that neither re-enacted nor amended the language in question. A thorough combing of the legislative history reveals fragmentary support for the notion that Congress may have been aware of a particular incorrect construction placed on the statute in question in a few cases decided by the Court of Claims. Notwithstanding that the weight of the evidence is against the hypothesis that Congress was aware of this construction, it is concluded that Congress not only assumed that the courts would continue to place this construction on the statute, but also actually enacted this assumption into law when it amended the statute in another respect. Through this remarkable exercise in reconstruction of the legislative process, the Court departs from both of the fundamental principles of statutory construction: that a court's object is to give effect to the intent of the enacting legislature, and that the surest guide to the intent of the legislature is the language of the statute itself.

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[6] Only a Congressman who had actually read the *Scroggins* decision and recognized Campbell's use of the language employed in that opinion would have had any basis for concluding that Campbell was alluding to the availability of *Scroggins* review. I think it is safe to assume that few Congressmen were familiar enough with the jurisprudence of the Court of Claims to recognize OPM's plagiarism.

I do not mean to endorse the simplistic view that the words printed in the United States Code can answer all questions regarding the meaning of statutes. Resort to legislative history will always be a necessary tool of statutory construction, and the circumstances under which courts should turn to legislative history and the weight to be accorded particular sources of history cannot be prescribed by inflexible canons of construction. Statutory interpretation requires a certain amount of freedom to choose the materials best suited to illuminating the meaning of the particular provisions at hand. But when the history is less useful than the statutory language itself—when, for example, the history can serve only as a basis for debatable speculations on what some Congress other than the one that enacted the statute thought that the statute meant when it did something else—courts should resist the temptation to let their enthusiasm for reports, hearings, and committee prints lead them to neglect the comparatively unambiguous meaning of the statute itself. In this case, the majority seems to me to have fallen prey to that temptation and thereby missed the proper interpretation of the statute.

I therefore dissent.

HAYES *v.* FLORIDA

CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

No. 83–6766. Argued January 9, 1985—Decided March 20, 1985

After concluding that petitioner was the principal suspect in a burglary-rape committed in Punta Gorda, Florida, the police, without a warrant, went to his home to obtain fingerprints. Arriving at the home, the police spoke to petitioner on his front porch, and when he expressed reluctance to accompany them to the station house, one officer said that they would arrest him. Petitioner replied that he would rather go to the station than be arrested. He was then taken to the station and fingerprinted. When it was determined that his prints matched those taken at the scene of the crime, he was arrested. The trial court denied his pretrial motion to suppress the fingerprint evidence, and he was convicted. The Florida District Court of Appeal affirmed, holding, although finding neither consent by petitioner to be taken to the station nor probable cause to arrest, that the police could transport petitioner to the station house and take his fingerprints on the basis of their reasonable suspicion that he was involved in the crime.

Held: Where there was no probable cause to arrest petitioner, no consent to the journey to the police station, and no prior judicial authorization for detaining him, the investigative detention at the station for fingerprinting purposes violated petitioner's rights under the Fourth Amendment, as made applicable to the States by the Fourteenth; hence the fingerprints taken were the inadmissible fruits of an illegal detention. *Davis* v. *Mississippi*, 394 U. S. 721. When the police, without probable cause or a warrant, forcibly remove a person from his home and transport him to the station, where he is detained, although briefly, for investigative purposes, such a seizure, at least where not under judicial supervision, is sufficiently like an arrest to invoke the traditional rule that arrests may constitutionally be made only on probable cause. Pp. 813–817.

439 So. 2d 896, reversed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. BRENNAN, J., filed an opinion concurring in the judgment, in which MARSHALL, J., joined, *post*, p. 818. BLACKMUN, J., concurred in the judgment. POWELL, J., took no part in the consideration or decision of the case.

Michael E. Raiden argued the cause and filed a brief for petitioner.

William I. Munsey, Jr., Assistant Attorney General of Florida, argued the cause for respondent. With him on the brief was *Jim Smith*, Attorney General.

JUSTICE WHITE delivered the opinion of the Court.

The issue before us in this case is whether the Fourth Amendment to the Constitution of the United States, applicable to the States by virtue of the Fourteenth Amendment, was properly applied by the District Court of Appeal of Florida, Second District, to allow police to transport a suspect to the station house for fingerprinting, without his consent and without probable cause or prior judicial authorization.

A series of burglary-rapes occurred in Punta Gorda, Florida, in 1980. Police found latent fingerprints on the doorknob of the bedroom of one of the victims, fingerprints they believed belonged to the assailant. The police also found a herringbone pattern tennis shoe print near the victim's front porch. Although they had little specific information to tie petitioner Hayes to the crime, after police interviewed him along with 30 to 40 other men who generally fit the description of the assailant, the investigators came to consider petitioner a principal suspect. They decided to visit petitioner's home to obtain his fingerprints or, if he was uncooperative, to arrest him. They did not seek a warrant authorizing this procedure.

Arriving at petitioner's house, the officers spoke to petitioner on his front porch. When he expressed reluctance voluntarily to accompany them to the station for fingerprinting, one of the investigators explained that they would therefore arrest him. Petitioner, in the words of the investigator, then "blurted out" that he would rather go with the officers to the station than be arrested. App. 20. While the officers were on the front porch, they also seized a pair of herringbone pattern tennis shoes in plain view.

Petitioner was then taken to the station house, where he was fingerprinted. When police determined that his prints matched those left at the scene of the crime, petitioner was placed under formal arrest. Before trial, petitioner moved to suppress the fingerprint evidence, claiming it was the fruit of an illegal detention. The trial court denied the motion and admitted the evidence without expressing a reason. Petitioner was convicted of the burglary and sexual battery committed at the scene where the latent fingerprints were found.

The District Court of Appeal of Florida, Second District, affirmed the conviction. 439 So. 2d 896 (1983). The court declined to find consent, reasoning that in view of the threatened arrest it was, "at best, highly questionable" that Hayes voluntarily accompanied the officers to the station. *Id.*, at 898. The court also expressly found that the officers did not have probable cause to arrest petitioner until after they obtained his fingerprints. *Id.*, at 899. Nevertheless, although finding neither consent nor probable cause, the court held, analogizing to the stop-and-frisk rule of *Terry* v. *Ohio*, 392 U. S. 1 (1968), that the officers could transport petitioner to the station house and take his fingerprints on the basis of their reasonable suspicion that he was involved in the crime. 439 So. 2d, at 899, 904.

The Florida Supreme Court denied review by a four-to-three decision, 447 So. 2d 886 (1983). We granted certiorari to review this application of *Terry*, 469 U. S. 816 (1984), and we now reverse.

We agree with petitioner that *Davis* v. *Mississippi*, 394 U. S. 721 (1969), requires reversal of the judgment below. In *Davis*, in the course of investigating a rape, police officers brought petitioner Davis to police headquarters on December 3, 1965. He was fingerprinted and briefly questioned before being released. He was later charged and convicted of the rape. An issue there was whether the fingerprints taken on December 3 were the inadmissible fruits of an illegal detention. Concededly, the police at that time were without probable cause for an arrest, there was no warrant, and Davis had not consented to being taken to the station house. The State nevertheless contended that the Fourth Amendment did not forbid an investigative detention for the purpose of fingerprinting, even in the absence of probable cause or a warrant. We rejected that submission, holding that Davis' detention for the purpose of fingerprinting was subject to the constraints of the Fourth Amendment and exceeded the permissible limits of those temporary seizures authorized by *Terry* v. *Ohio*, *supra*. This was so even though fingerprinting, because it involves neither repeated harassment nor any of the probing into private life and thoughts that often marks interrogation and search, represents a much less serious intrusion upon personal security than other types of searches and detentions. 394 U. S., at 727. Nor was it a sufficient answer to the Fourth Amendment issue to recognize that fingerprinting is an inherently more reliable and effective crime-solving mechanism than other types of evidence such as lineups and confessions. *Ibid.* The Court indicated that perhaps under narrowly confined circumstances, a detention for fingerprinting on less than probable cause might comply with the Fourth Amendment, but found it unnecessary to decide that question since no effort was made to employ the procedures necessary to satisfy the Fourth Amendment. *Id.*, at 728. Rather, Davis had been detained at police headquarters without probable cause to arrest and without authorization by a judicial officer.

Here, as in *Davis*, there was no probable cause to arrest, no consent to the journey to the police station, and no judicial authorization for such a detention for fingerprinting purposes.[1] Unless later cases have undermined *Davis* or we now disavow that decision, the judgment below must be reversed.

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[1] The Florida District Court of Appeal judged this case on the basis of its determination that the police were without probable cause to arrest and that Hayes did not voluntarily agree to accompany the officers to the police station. Although the State invites us to review the record and hold either that there was probable cause to arrest or that Hayes voluntarily

None of our later cases have undercut the holding in *Davis* that transportation to and investigative detention at the station house without probable cause or judicial authorization together violate the Fourth Amendment. Indeed, some 10 years later, in *Dunaway* v. *New York*, 442 U. S. 200 (1979), we refused to extend *Terry* v. *Ohio*, *supra*, to authorize investigative interrogations at police stations on less than probable cause, even though proper warnings under *Miranda* v. *Arizona*, 384 U. S. 436 (1966), had been given. We relied on and reaffirmed the holding in *Davis* that in the absence of probable cause or a warrant investigative detentions at the police station for fingerprinting purposes could not be squared with the Fourth Amendment, 442 U. S., at 213–216, while at the same time repeating the possibility that the Amendment might permit a narrowly circumscribed procedure for fingerprinting detentions on less than probable cause. Since that time, we have several times revisited and explored the reach of *Terry* v. *Ohio*, most recently in *United States* v. *Sharpe*, *ante*, p. 675, and *United States* v. *Hensley*, 469 U. S. 221 (1985). But none of these cases have sustained against Fourth Amendment challenge the involuntary removal of a suspect from his home to a police station and his detention there for investigative purposes, whether for interrogation or fingerprinting, absent probable cause or judicial authorization.

Nor are we inclined to forswear *Davis*. There is no doubt that at some point in the investigative process, police pro-

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went with the officers to the station, we decline to become involved in these fact-bound issues. We also put aside the State's suggestion that the inevitable discovery exception to the exclusionary rule, see *Nix* v. *Williams*, 467 U. S. 431 (1984), applies in this case. This argument was not presented to or passed upon by any of the state courts and is presented here for the first time. We thus address only the issue decided by the Florida court and presented in the petition for certiorari.

cedures can qualitatively and quantitatively be so intrusive with respect to a suspect's freedom of movement and privacy interests as to trigger the full protection of the Fourth and Fourteenth Amendments. *Dunaway*, *supra*, at 212; *Florida* v. *Royer*, 460 U. S. 491, 499 (1983) (plurality opinion). And our view continues to be that the line is crossed when the police, without probable cause or a warrant, forcibly remove a person from his home or other place in which he is entitled to be and transport him to the police station, where he is detained, although briefly, for investigative purposes. We adhere to the view that such seizures, at least where not under judicial supervision, are sufficiently like arrests to invoke the traditional rule that arrests may constitutionally be made only on probable cause.[2]

None of the foregoing implies that a brief detention in the field for the purpose of fingerprinting, where there is only reasonable suspicion not amounting to probable cause, is necessarily impermissible under the Fourth Amendment. In addressing the reach of a *Terry* stop in *Adams* v. *Williams*, 407 U. S. 143, 146 (1972), we observed that "[a] brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time." Also, just this Term, we concluded that if there are articulable facts supporting a reasonable suspicion that a person has committed a criminal offense, that person may be stopped in order to identify him, to question him briefly, or to detain him briefly while attempting to obtain additional information. *United States* v. *Hensley*, *supra*, at 229, 232, 234. Cf. *United States*

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[2] Thus, in *United States* v. *Sharpe*, *ante*, p. 675, where we recently sustained a 20-minute investigatory stop on a highway, we pointed out that the pertinent facts in *Dunaway*, where we invalidated the detention, were "that (1) the defendant was taken from a private dwelling; (2) he was transported unwillingly to the police station; and (3) he there was subjected to custodial interrogation resulting in a confession." *Ante*, at 684, n. 4.

v. *Place,* 462 U. S. 696 (1983); *United States* v. *Martinez-Fuerte,* 428 U. S. 543 (1976); *United States* v. *Brignoni-Ponce,* 422 U. S. 873 (1975). There is thus support in our cases for the view that the Fourth Amendment would permit seizures for the purpose of fingerprinting, if there is reasonable suspicion that the suspect has committed a criminal act, if there is a reasonable basis for believing that fingerprinting will establish or negate the suspect's connection with that crime, and if the procedure is carried out with dispatch. Cf. *United States* v. *Place, supra.* Of course, neither reasonable suspicion nor probable cause would suffice to permit the officers to make a warrantless entry into a person's house for the purpose of obtaining fingerprint identification. *Payton* v. *New York,* 445 U. S. 573 (1980).

We also do not abandon the suggestion in *Davis* and *Dunaway* that under circumscribed procedures, the Fourth Amendment might permit the judiciary to authorize the seizure of a person on less than probable cause and his removal to the police station for the purpose of fingerprinting. We do not, of course, have such a case before us.[3] We do note, however, that some States, in reliance on the suggestion in *Davis,* have enacted procedures for judicially authorized seizures for the purpose of fingerprinting. The state courts are not in accord on the validity of these efforts to insulate investigative seizures from Fourth Amendment invalidation. Compare *People* v. *Madson,* 638 P. 2d 18, 31–32 (Colo. 1981), with *State* v. *Evans,* 215 Neb. 433, 438–439, 338 N. W. 2d 788, 792–793 (1983), and *In re an Investigation into Death of Abe A.,* 56 N. Y. 2d 288, 295–296, 437 N. E. 2d 265, 269 (1982).

As we have said, absent probable cause and a warrant, *Davis* v. *Mississippi,* 394 U. S. 721 (1969), requires the reversal of the judgment of the Florida District Court of Appeal.

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[3] Nor is there any suggestion in this case that there were any exigent circumstances making necessary the removal of Hayes to the station house for the purpose of fingerprinting.

It is so ordered.

JUSTICE BLACKMUN concurs in the judgment.

JUSTICE POWELL took no part in the consideration or decision in this case.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, concurring in the judgment.

A young man is picked up by the police. He is taken to the police station, where he is held while his fingerprints are taken. The police have neither probable cause to arrest nor have they obtained a warrant.

These were the facts of *Davis* v. *Mississippi*, 394 U. S. 721 (1969). They are also the facts of the instant case. We held in *Davis* that the detention was an unreasonable seizure in violation of the Fourth Amendment. The facts of *Davis* did not raise the question whether warrantless on-site fingerprinting would constitute a reasonable search or seizure for Fourth Amendment purposes. Thus, although we noted that "the general requirement that the authorization of a judicial officer be obtained in advance of detention would seem not to admit of any exception in the fingerprinting context," we sensibly left open the question "whether the requirements of the Fourth Amendment could be met by narrowly circumscribed procedures for obtaining, during the course of a criminal investigation, the fingerprints of individuals for whom there is no probable cause to arrest." *Id.*, at 728.

The Court's opinion today recognizes that the instant case is indistinguishable from *Davis* and goes on to draw the unsurprising conclusion that the seizure here, like that in *Davis*, violated the Fourth Amendment. In reaffirming *Davis*, the Court holds that a suspect may not be apprehended, detained, and forced to accompany the police to another location to be fingerprinted without a warrant or probable cause. *Ante*, at 815–816. The intrusion on the suspect's freedom of action in such a case is simply too great to be "reasonable" under the Fourth Amendment. I fully agree.

Unlike the Court in *Davis*, however, the Court today—after tidily disposing of the case before it—returns to its regrettable assault on the Fourth Amendment by reaching beyond any issue properly before us virtually to hold that on-site fingerprinting without probable cause or a warrant is constitutionally reasonable. See *ante*, at 817 ("There is thus support in our cases for the view that the Fourth Amendment would permit seizures for the purpose of fingerprinting, if there is reasonable suspicion that the suspect has committed a criminal act, if there is a reasonable basis for believing that fingerprinting will establish or negate the suspect's connection with that crime, and if the procedure is carried out with dispatch"). The validity of on-site fingerprinting is no more implicated by the facts of this case than it was by *Davis*. Consequently I disagree with the Court's strained effort to reach the question today.

If the police wanted to detain an individual for on-site fingerprinting, the intrusion would have to be measured by the standards of *Terry* v. *Ohio*, 392 U. S. 1 (1968), and our other Fourth Amendment cases. Yet the record here contains no information useful in applying *Terry* to this hypothetical police practice. It would seem that on-site fingerprinting (apparently undertaken in full view of any passerby) would involve a singular intrusion on the suspect's privacy, an intrusion that would not be justifiable (as was the patdown in *Terry*) as necessary for the officer's protection. How much time would elapse before the individual would be free to go? Could the police hold the individual until the fingerprints could be compared with others? The parties did not brief or argue these questions, the record contains nothing that is useful in their resolution, and (naturally enough) the courts below did not address them.

Ordinarily—outside the Fourth Amendment context, at any rate—we wait for a case to arise before addressing the application of a legal standard to a set of facts. I disagree with the Court's apparent attempt to render an advisory opinion concerning the Fourth Amendment implications of a police practice that, as far as we know, has never been attempted by the police in this or any other case.

HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* CHANEY ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-1878. Argued December 3, 1984—Decided March 20, 1985

Respondent prison inmates were convicted of capital offenses and sentenced to death by lethal injection of drugs. They petitioned the Food and Drug Administration (FDA), alleging that use of the drugs for such a purpose violated the Federal Food, Drug, and Cosmetic Act (FDCA), and requesting that the FDA take various enforcement actions to prevent those violations. The FDA refused the request. Respondents then brought an action in Federal District Court against petitioner Secretary of Health and Human Services, making the same claim and seeking the same enforcement actions. The District Court granted summary judgment for petitioner, holding that nothing in the FDCA indicated an intent to circumscribe the FDA's enforcement discretion or to make it reviewable. The Court of Appeals reversed. Noting that the Administrative Procedure Act (APA) only precludes judicial review of federal agency action when it is precluded by statute, 5 U. S. C. § 701(a)(1), or "committed to agency discretion by law," § 701(a)(2), the court held that § 701(a)(2)'s exception applies only where the substantive statute leaves the courts with "no law to apply," that here there was "law to apply," that therefore the FDA's refusal to take enforcement action was reviewable, and that moreover such refusal was an abuse of discretion.

Held: The FDA's decision not to take the enforcement actions requested by respondents was not subject to review under the APA. Pp. 827-838.

(a) Under § 701(a)(2), judicial review of an administrative agency's decision is not to be had if the statute in question is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion. In such a case, the statute ("law") can be taken to have "committed" the decisionmaking to the agency's judgment absolutely. An agency's decision not to take enforcement action is presumed immune from judicial review under § 701(a)(2). Such a decision has traditionally been "committed to agency discretion," and it does not appear that Congress in enacting the APA intended to alter that tradition. Accordingly, such a decision is unreviewable unless Congress has indicated an intent to circumscribe agency enforcement discretion, and has provided meaningful standards for defining the limits of that discretion. Pp. 827–835.

(b) The presumption that agency decisions not to institute enforcement proceedings are unreviewable under § 701(a)(2) is not overcome by the enforcement provisions of the FDCA. Those provisions commit complete discretion to the Secretary to decide how and when they should be exercised. The FDCA's prohibition of "misbranding" of drugs and introduction of "new drugs," absent agency approval, does not supply this Court with "law to apply." Nor can the FDA's "policy statement" indicating that the agency considered itself "obligated" to take certain investigative actions, be plausibly read to override the agency's rule expressly stating that the FDA Commissioner shall object to judicial review of a decision to recommend or not to recommend civil or criminal enforcement action. And the section of the FDCA providing that the Secretary need not report for prosecution minor violations of the Act does not give rise to the negative implication that the Secretary is required to investigate purported "major" violations of the Act. Pp. 835–837.

231 U. S. App. D. C. 136, 718 F. 2d 1174, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, BLACKMUN, POWELL, STEVENS, and O'CONNOR, JJ., joined. BRENNAN, J., filed a concurring opinion, *post*, p. 838. MARSHALL, J., filed an opinion concurring in the judgment, *post*, p. 840.

Deputy Solicitor General Geller argued the cause for petitioner. With him on the briefs were *Solicitor General Lee, Acting Assistant Attorney General Willard, Samuel A. Alito, Jr., Leonard Schaitman, John M. Rogers, Thomas Scarlett,* and *Michael P. Peskoe.*

Steven M. Kristovich argued the cause for respondents. With him on the brief were *David E. Kendall, Julius LeVonne Chambers, James M. Nabrit III, John Charles Boger, James S. Liebman,* and *Anthony G. Amsterdam.**

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*A brief of *amicus curiae* urging reversal was filed for the Washington Legal Foundation by *Daniel J. Popeo, Paul D. Kamenar, George C. Smith,* and *Stephen Weitzman.*

Briefs of *amici curiae* urging affirmance were filed for the American Society of Law and Medicine et al. by *James M. Doyle;* and for the Public Citizen by *Alan B. Morrison* and *William B. Schultz.*

JUSTICE REHNQUIST delivered the opinion of the Court.

This case presents the question of the extent to which a decision of an administrative agency to exercise its "discretion" not to undertake certain enforcement actions is subject to judicial review under the Administrative Procedure Act, 5 U. S. C. § 501 *et seq.* (APA). Respondents are several prison inmates convicted of capital offenses and sentenced to death by lethal injection of drugs. They petitioned the Food and Drug Administration (FDA), alleging that under the circumstances the use of these drugs for capital punishment violated the Federal Food, Drug, and Cosmetic Act, 52 Stat. 1040, as amended, 21 U. S. C. § 301 *et seq.* (FDCA), and requesting that the FDA take various enforcement actions to prevent these violations. The FDA refused their request. We review here a decision of the Court of Appeals for the District of Columbia Circuit, which held the FDA's refusal to take enforcement actions both reviewable and an abuse of discretion, and remanded the case with directions that the agency be required "to fulfill its statutory function." 231 U. S. App. D. C. 136, 153, 718 F. 2d 1174, 1191 (1983).

I

Respondents have been sentenced to death by lethal injection of drugs under the laws of the States of Oklahoma and Texas. Those States, and several others, have recently adopted this method for carrying out the capital sentence. Respondents first petitioned the FDA, claiming that the drugs used by the States for this purpose, although approved by the FDA for the medical purposes stated on their labels, were not approved for use in human executions. They alleged that the drugs had not been tested for the purpose for which they were to be used, and that, given that the drugs would likely be administered by untrained personnel, it was also likely that the drugs would not induce the quick and painless death intended. They urged that use of these drugs for human execution was the "unapproved use of an approved drug" and constituted a violation of the Act's prohibitions against "misbranding."[1] They also suggested that the FDCA's requirements for approval of "new drugs" applied, since these drugs were now being used for a new purpose. Accordingly, respondents claimed that the FDA was required to approve the drugs as "safe and effective" for human execution before they could be distributed in interstate commerce. See 21 U. S. C. § 355. They therefore requested the FDA to take various investigatory and enforcement actions to prevent these perceived violations; they requested the FDA to affix warnings to the labels of all the drugs stating that they were unapproved and unsafe for human execution, to send statements to the drug manufacturers and prison administrators stating that the drugs should not be so used, and to adopt procedures for seizing the drugs from state prisons and to recommend the prosecution of all those in the chain of distribution who knowingly distribute or purchase the drugs with intent to use them for human execution.

The FDA Commissioner responded, refusing to take the requested actions. The Commissioner first detailed his disagreement with respondents' understanding of the scope of FDA jurisdiction over the unapproved use of approved drugs for human execution, concluding that FDA jurisdiction in the area was generally unclear but in any event should not be exercised to interfere with this particular aspect of state criminal justice systems. He went on to state:

> "Were FDA clearly to have jurisdiction in the area, moreover, we believe we would be authorized to decline to exercise it under our inherent discretion to decline to pursue certain enforcement matters. The unapproved use of approved drugs is an area in which the case law is far from uniform. Generally, enforcement proceedings in this area are initiated only when there is a serious

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[1] See 21 U. S. C. § 352(f): "A drug or device shall be deemed to be misbranded . . . [u]nless its labeling bears (1) adequate directions for use . . . ."

> danger to the public health or a blatant scheme to defraud. We cannot conclude that those dangers are present under State lethal injection laws, which are duly authorized statutory enactments in furtherance of proper State functions. . . ."

Respondents then filed the instant suit in the United States District Court for the District of Columbia, claiming the same violations of the FDCA and asking that the FDA be required to take the same enforcement actions requested in the prior petition.[2] Jurisdiction was grounded in the general federal-question jurisdiction statute, 28 U. S. C. § 1331, and review of the agency action was sought under the judicial review provisions of the APA, 5 U. S. C. §§ 701–706. The District Court granted summary judgment for petitioner. It began with the proposition that "decisions of executive departments and agencies to *refrain* from instituting investigative and enforcement proceedings are essentially unreviewable by the courts." *Chaney* v. *Schweiker*, Civ. No. 81–2265 (DC, Aug. 30, 1982), App. to Pet. for Cert. 74a (emphasis in original). The court then cited case law stating that nothing in the FDCA indicated an intent to circumscribe the FDA's enforcement discretion or to make it reviewable.

A divided panel of the Court of Appeals for the District of Columbia Circuit reversed. The majority began by discussing the FDA's jurisdiction over the unapproved use of approved drugs for human execution, and concluded that the FDA did have jurisdiction over such a use. The court then addressed the Government's assertion of unreviewable discretion to refuse enforcement action. It first discussed this Court's opinions which have held that there is a general presumption that all agency decisions are reviewable under the APA, at least to assess whether the actions were "arbitrary, capricious, or an abuse of discretion." See *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 139–141 (1967); 5 U. S. C. § 706(2)(A). It noted that the APA, 5 U. S. C. § 701, only precludes judicial review of final agency action—including refusals to act, see 5 U. S. C. § 551(13)—when review is precluded by statute, or "committed to agency discretion by law." Citing this Court's opinions in *Dunlop* v. *Bachowski*, 421 U. S. 560 (1975), and *Citizens to Preserve Overton Park* v. *Volpe*, 401 U. S. 402 (1971), for the view that these exceptions should be narrowly construed, the court held that the "committed to agency discretion by law" exception of § 701(a)(2) should be invoked only where the substantive statute left the courts with "no law to apply." 231 U. S. App. D. C., at 146, 718 F. 2d, at 1184 (citing *Citizens to Preserve Overton Park*, *supra*, at 410). The court cited *Dunlop* as holding that this presumption "applies with no less force to review of . . . agency decisions to refrain from enforcement action." 231 U. S. App. D. C., at 146, 718 F. 2d, at 1184.

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[2] Although respondents also requested an evidentiary hearing, the District Court regarded this hearing as having "no purpose apart from serving as a prelude to the pursuit of the very enforcement steps that plaintiffs demanded in their administrative petition." *Chaney* v. *Schweiker*, Civ. No. 81–2265 (DC, Aug. 30, 1982), App. to Pet. for Cert. 77a, n. 15. Respondents have not challenged the statement that all they sought were certain enforcement actions, and this case therefore does not involve the question of agency discretion not to invoke rulemaking proceedings.

The court found "law to apply" in the form of a FDA policy statement which indicated that the agency was "obligated" to investigate the unapproved use of an approved drug when such use became "widespread" or "endanger[ed] the public health." *Id.*, at 148, 718 F. 2d, at 1186 (citing 37 Fed. Reg. 16504 (1972)). The court held that this policy statement constituted a "rule" and was considered binding by the FDA. Given the policy statement indicating that the FDA should take enforcement action in this area, and the strong presumption that all agency action is subject to judicial review, the court concluded that review of the agency's refusal was not foreclosed. It then proceeded to assess whether the agency's decision not to act was "arbitrary, capricious, or an abuse of discretion." Citing evidence that the FDA assumed jurisdiction over drugs used to put animals to sleep[3] and the unapproved uses of drugs on prisoners in clinical experiments, the court found that the FDA's refusal, for the reasons given, was irrational, and that respondents' evidence that use of the drugs could lead to a cruel and protracted death was entitled to more searching consideration. The court therefore remanded the case to the District Court, to order the FDA "to fulfill its statutory function."

The dissenting judge expressed the view that an agency's decision not to institute enforcement action generally is unreviewable, and that such exercises of "prosecutorial discretion" presumptively fall within the APA's exception for agency actions "committed to agency discretion by law." He noted that traditionally courts have been wary of second-guessing agency decisions not to enforce, given the agency's expertise and better understanding of its enforcement policies and available resources. He likewise concluded that nothing in the FDCA or FDA regulations would provide a basis for a court's review of this agency decision. A divided Court of Appeals denied the petition for rehearing. 233 U. S. App. D. C. 146, 724 F. 2d 1030 (1984). We granted certiorari to review the implausible result that the FDA is required to exercise its enforcement power to ensure that States only use drugs that are "safe and effective" for human execution. 467 U. S. 1251 (1984). We reverse.

II

The Court of Appeals' decision addressed three questions: (1) whether the FDA had jurisdiction to undertake the enforcement actions requested, (2) whether if it did have jurisdiction its refusal to take those actions was subject to judicial review, and (3) whether if reviewable its refusal was arbitrary, capricious, or an abuse of discretion. In reaching our conclusion that the Court of Appeals was wrong, however, we need not and do not address the thorny question of the FDA's jurisdiction. For us, this case turns on the important question of the extent to which determinations by the FDA *not to exercise* its enforcement authority over the use of drugs in interstate commerce may be judicially reviewed. That decision in turn involves the construction of two separate but necessarily interrelated statutes, the APA and the FDCA.

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[3] In response to respondents' petition, the Commissioner had explained that the FDA had assumed jurisdiction in these cases because, unlike the drugs used for human execution, these drugs were "new drugs" *intended by the manufacturer* to be used for this purpose, and thus fell squarely within the FDA's approval jurisdiction. The Court of Appeals did not explain why this distinction was not "rational."

The APA's comprehensive provisions for judicial review of "agency actions" are contained in 5 U. S. C. §§ 701–706. Any person "adversely affected or aggrieved" by agency action, see § 702, including a "failure to act," is entitled to "judicial review thereof," as long as the action is a "final agency action for which there is no other adequate remedy in a court," see § 704. The standards to be applied on review are governed by the provisions of § 706. But before any review at all may be had, a party must first clear the hurdle of § 701(a). That section provides that the chapter on judicial review "applies, according to the provisions thereof, except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." Petitioner urges that the decision of the FDA to refuse enforcement is an action "committed to agency discretion by law" under § 701(a)(2).

This Court has not had occasion to interpret this second exception in § 701(a) in any great detail. On its face, the section does not obviously lend itself to any particular construction; indeed, one might wonder what difference exists between § (a)(1) and § (a)(2). The former section seems easy in application; it requires construction of the substantive statute involved to determine whether Congress intended to preclude judicial review of certain decisions. That is the approach taken with respect to § (a)(1) in cases such as *South-*

ern R. Co. v. *Seaboard Allied Milling Corp,* 442 U. S. 444 (1979), and *Dunlop* v. *Bachowski,* 421 U. S., at 567. But one could read the language "committed to agency discretion *by law*" in § (a)(2) to require a similar inquiry. In addition, commentators have pointed out that construction of § (a)(2) is further complicated by the tension between a literal reading of § (a)(2), which exempts from judicial review those decisions committed to agency "discretion," and the primary scope of review prescribed by § 706(2)(A)—whether the agency's action was "arbitrary, capricious, or an *abuse of discretion.*" How is it, they ask, that an action committed to agency discretion can be unreviewable and yet courts still can review agency actions for abuse of that discretion? See 5 K. Davis, Administrative Law § 28:6 (1984) (hereafter Davis); Berger, Administrative Arbitrariness and Judicial Review, 65 Colum. L. Rev. 55, 58 (1965). The APA's legislative history provides little help on this score. Mindful, however, of the common-sense principle of statutory construction that sections of a statute generally should be read "to give effect, if possible, to every clause . . . ," see *United States* v. *Menasche,* 348 U. S. 528, 538–539 (1955), we think there is a proper construction of § (a)(2) which satisfies each of these concerns.

This Court first discussed § (a)(2) in *Citizens to Preserve Overton Park* v. *Volpe,* 401 U. S. 402 (1971). That case dealt with the Secretary of Transportation's approval of the building of an interstate highway through a park in Memphis, Tennessee. The relevant federal statute provided that the Secretary "shall not approve" any program or project using public parkland unless the Secretary first determined that no feasible alternatives were available. *Id.,* at 411. Interested citizens challenged the Secretary's approval under the APA, arguing that he had not satisfied the substantive statute's requirements. This Court first addressed the "threshold question" of whether the agency's action was at all reviewable. After setting out the language of § 701(a), the Court stated:

> "In this case, there is no indication that Congress sought to prohibit judicial review and there is most certainly no 'showing of "clear and convincing evidence" of a . . . legislative intent' to restrict access to judicial review. *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 141 (1967). . . .
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> "Similarly, the Secretary's decision here does not fall within the exception for action 'committed to agency discretion.' This is a very narrow exception. . . . The legislative history of the Administrative Procedure Act indicates that it is applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.' S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945)." *Overton Park*, *supra*, at 410 (footnote omitted).

The above quote answers several of the questions raised by the language of § 701(a), although it raises others. First, it clearly separates the exception provided by § (a)(1) from the § (a)(2) exception. The former applies when Congress has expressed an intent to preclude judicial review. The latter applies in different circumstances; even where Congress has not affirmatively precluded review, review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion. In such a case, the statute ("law") can be taken to have "committed" the decisionmaking to the agency's judgment absolutely. This construction avoids conflict with the "abuse of discretion" standard of review in § 706—if no judicially manageable standards are available for judging how and when an agency should exercise its discretion, then it is impossible to evaluate agency action for "abuse of discretion." In addition, this construction satisfies the principle of statutory construction mentioned earlier, by identifying a separate class of cases to which § 701(a)(2) applies.

To this point our analysis does not differ significantly from that of the Court of Appeals. That court purported to apply the "no law to apply" standard of *Overton Park*. We disagree, however, with that court's insistence that the "narrow construction" of § (a)(2) required application of a presumption of reviewability even to an agency's decision not to undertake certain enforcement actions. Here we think the Court of Appeals broke with tradition, case law, and sound reasoning.

Overton Park did not involve an agency's refusal to take requested enforcement action. It involved an affirmative act of approval under a statute that set clear guidelines for determining when such approval should be given. Refusals to take enforcement steps generally involve precisely the opposite situation, and in that situation we think the presumption is that judicial review is not available. This Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion. See *United States* v. *Batchelder*, 442 U. S. 114, 123–124 (1979); *United States* v. *Nixon*, 418 U. S. 683, 693 (1974); *Vaca* v. *Sipes*, 386 U. S. 171, 182 (1967); *Confiscation Cases*, 7 Wall. 454 (1869). This recognition of the existence of discretion is attributable in no small part to the general unsuitability for judicial review of agency decisions to refuse enforcement.

The reasons for this general unsuitability are many. First, an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities. Similar concerns animate the principles of administrative law that courts generally will defer to an agency's construction of the statute it is charged with implementing, and to the procedures it adopts for implementing that statute. See *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U. S. 519, 543 (1978); *Train* v. *Natural Resources Defense Council, Inc.*, 421 U. S. 60, 87 (1975).

In addition to these administrative concerns, we note that when an agency refuses to act it generally does not exercise its *coercive* power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect. Similarly, when an agency *does* act to enforce, that action itself provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner. The action at least can be reviewed to determine whether the agency exceeded its statutory powers. See, *e. g.*, *FTC* v. *Klesner*, 280 U. S. 19 (1929). Finally, we recognize that an agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to "take Care that the Laws be faithfully executed." U. S. Const., Art. II, § 3.

We of course only list the above concerns to facilitate understanding of our conclusion that an agency's decision not to take enforcement action should be presumed immune from judicial review under § 701(a)(2). For good reasons, such a decision has traditionally been "committed to agency discretion," and we believe that the Congress enacting the APA did not intend to alter that tradition. Cf. 5 Davis § 28:5 (APA did not significantly alter the "common law" of judicial review of agency action). In so stating, we emphasize that the decision is only presumptively unreviewable; the presumption may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers.[4] Thus, in establishing this presumption in the APA, Congress did not set agencies free to disregard legislative direction in the statutory scheme that the agency administers. Congress may limit an agency's exercise of enforcement power if it wishes, either by setting substantive priorities, or by otherwise circumscribing an agency's power to discriminate among issues or cases it will pursue. How to determine when Congress has done so is the question left open by *Overton Park.*

Dunlop v. *Bachowski*, 421 U. S. 560 (1975), relied upon heavily by respondents and the majority in the Court of Appeals, presents an example of statutory language which supplied sufficient standards to rebut the presumption of unreviewability. *Dunlop* involved a suit by a union employee, under the Labor-Management Reporting and Disclosure Act, 29 U. S. C. § 481 *et seq.* (LMRDA), asking the Secretary of Labor to investigate and file suit to set aside a union election. Section 482 provided that, upon filing of a complaint by a union member, "[t]he Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation . . . has occurred . . . he shall . . . bring a civil action . . . ." After investigating the plaintiff's claims the Secretary of Labor declined to file suit, and the plaintiff sought judicial review under the APA. This Court held that review was available. It rejected the Secretary's argument that the statute precluded judicial review, and in a footnote it stated its agreement with the conclusion of the Court of Appeals that the decision was not "an unreviewable exercise of prosecutorial discretion." 421 U. S., at 567, n. 7. Our textual references to the "strong presumption" of reviewability in *Dunlop* were addressed only to the § (a)(1) exception; we were content to rely on the Court of Appeals' opinion to hold that the § (a)(2) exception did not apply. The Court of Appeals, in turn, had found the "principle of absolute prosecutorial discretion" inapplicable, because the language of the LMRDA indicated that the Secretary was required to file suit if certain "clearly defined" factors were present. The decision therefore was not "'beyond the judicial capacity to supervise.'" *Bachowski* v. *Brennan*, 502 F. 2d 79, 87–88 (CA3 1974) (quoting Davis § 28.16, p. 984 (1970 Supp.)).

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[4] We do not have in this case a refusal by the agency to institute proceedings based solely on the belief that it lacks jurisdiction. Nor do we have a situation where it could justifiably be found that the agency has "consciously and expressly adopted a general policy" that is so extreme as to amount to an abdication of its statutory responsibilities. See, *e. g.*, *Adams* v. *Richardson*, 156 U. S. App. D. C. 267, 480 F. 2d 1159 (1973) (en banc). Although we express no opinion on whether such decisions would be unreviewable under § 701(a)(2), we note that in those situations the statute conferring authority on the agency might indicate that such decisions were not "committed to agency discretion."

Dunlop is thus consistent with a general presumption of unreviewability of decisions not to enforce. The statute being administered quite clearly withdrew discretion from the agency and provided guidelines for exercise of its enforcement power. Our decision that review was available was not based on "pragmatic considerations," such as those cited by the Court of Appeals, see 231 U. S. App. D. C., at 147, 718 F. 2d, at 1185, that amount to an assessment of whether the interests at stake are important enough to justify intervention in the agencies' decisionmaking. The danger that agencies may not carry out their delegated powers with sufficient vigor does not necessarily lead to the conclusion that courts are the most appropriate body to police this aspect of their performance. That decision is in the first instance for Congress, and we therefore turn to the FDCA to determine whether in this case Congress has provided us with "law to apply." If it has indicated an intent to circumscribe agency enforcement discretion, and has provided meaningful standards for defining the limits of that discretion, there is "law to apply" under § 701(a)(2), and courts may require that the agency follow that law; if it has not, then an agency refusal to institute proceedings is a decision "committed to agency discretion by law" within the meaning of that section.

III

To enforce the various substantive prohibitions contained in the FDCA, the Act provides for injunctions, 21 U. S. C. § 332, criminal sanctions, §§ 333 and 335, and seizure of any offending food, drug, or cosmetic article, § 334. The Act's general provision for enforcement, § 372, provides only that "[t]he Secretary is *authorized* to conduct examinations and investigations . . ." (emphasis added). Unlike the statute at issue in *Dunlop*, § 332 gives no indication of when an injunction should be sought, and § 334, providing for seizures, is framed in the permissive—the offending food, drug, or cosmetic "shall be liable to be proceeded against." The section on criminal sanctions states baldly that any person who violates the Act's substantive prohibitions "shall be imprisoned . . . or fined." Respondents argue that this statement mandates criminal prosecution of every violator of the Act but they adduce no indication in case law or legislative history that such was Congress' intention in using this language, which is commonly found in the criminal provisions of Title 18 of the United States Code. See, *e. g.*, 18 U. S. C. § 471 (counterfeiting); 18 U. S. C. § 1001 (false statements to Government officials); 18 U. S. C. § 1341 (mail fraud). We are unwilling to attribute such a sweeping meaning to this language, particularly since the Act charges the Secretary only with recommending prosecution; any criminal prosecutions must be instituted by the Attorney General. The Act's enforcement provisions thus commit complete discretion to the Secretary to decide how and when they should be exercised.

Respondents nevertheless present three separate authorities that they claim provide the courts with sufficient indicia of an intent to circumscribe enforcement discretion. Two of these may be dealt with summarily. First, we reject respondents' argument that the Act's substantive prohibitions of "misbranding" and the introduction of "new drugs" absent agency approval, see 21 U. S. C. §§352(f)(1), 355, supply us with "law to apply." These provisions are simply irrelevant to the agency's discretion to refuse to initiate proceedings.

We also find singularly unhelpful the agency "policy statement" on which the Court of Appeals placed great reliance. We would have difficulty with this statement's vague language even if it were a properly adopted agency rule. Although the statement indicates that the agency considered itself "obligated" to take certain investigative actions, that language did not arise in the course of discussing the agency's discretion to exercise its enforcement power, but rather in the context of describing agency policy with respect to unapproved uses of approved drugs by physicians. In addition, if read to circumscribe agency enforcement discretion, the statement conflicts with the agency rule on judicial review, 21 CFR §10.45(d)(2) (1984), which states that "[t]he Commissioner shall object to judicial review . . . if (i) [t]he matter is committed by law to the discretion of the Commissioner, e. g., a decision to recommend or not to recommend civil or criminal enforcement action . . . ." But in any event the policy statement was attached to a rule that was never adopted. Whatever force such a statement might have, and leaving to one side the problem of whether an agency's rules might under certain circumstances provide courts with adequate guidelines for informed judicial review of decisions not to enforce, we do not think the language of the agency's "policy statement" can plausibly be read to override the agency's express assertion of unreviewable discretion contained in the above rule.[5]

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[5] Respondents also urge, as did the Court of Appeals, that a statement by the FDA's lawyers in a footnote to to their "memorandum in support of dismissal" in the District Court indicates that the agency considers the "policy statement" "binding." The footnote said that the "Federal Regis-

Respondents' third argument, based upon § 306 of the FDCA, merits only slightly more consideration. That section provides:

> "Nothing in this chapter shall be construed as requiring the Secretary to report for prosecution, or for the institution of libel or injunction proceedings, minor violations of this chapter whenever he believes that the public interest will be adequately served by a suitable written notice or ruling." 21 U. S. C. § 336.

Respondents seek to draw from this section the negative implication that the Secretary is *required* to report for prosecution all "major" violations of the Act, however those might be defined, and that it therefore supplies the needed indication of an intent to limit agency enforcement discretion. We think that this section simply does not give rise to the negative implication which respondents seek to draw from it. The section is not addressed to agency proceedings designed to discover the existence of violations, but applies only to a situation where a violation has already been established to the satisfaction of the agency. We do not believe the section speaks to the criteria which shall be used by the agency for investigating *possible* violations of the Act.

IV

We therefore conclude that the presumption that agency decisions not to institute proceedings are unreviewable under 5 U. S. C. § 701(a)(2) is not overcome by the enforcement provisions of the FDCA. The FDA's decision not to take the

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ter notice . . . sets forth the agency's current position o[n] the legal status of approved labeling for prescription drugs." The statement from the memorandum cites no authority, is taken out of context, and on its face does not indicate that the agency considered this position "binding" in any sense of the word. Moreover, we find it difficult to believe that statements of agency counsel in litigation against private individuals can be taken to establish "rules" that bind an entire agency prospectively. Such would turn orderly process on its head.

enforcement actions requested by respondents is therefore not subject to judicial review under the APA. The general exception to reviewability provided by § 701(a)(2) for action "committed to agency discretion" remains a narrow one, see *Citizens to Preserve Overton Park* v. *Volpe*, 401 U. S. 402 (1971), but within that exception are included agency refusals to institute investigative or enforcement proceedings, unless Congress has indicated otherwise. In so holding, we essentially leave to Congress, and not to the courts, the decision as to whether an agency's refusal to institute proceedings should be judicially reviewable. No colorable claim is made in this case that the agency's refusal to institute proceedings violated any constitutional rights of respondents, and we do not address the issue that would be raised in such a case. Cf. *Johnson* v. *Robison*, 415 U. S. 361, 366 (1974); *Yick Wo* v. *Hopkins*, 118 U. S. 356, 372–374 (1886). The fact that the drugs involved in this case are ultimately to be used in imposing the death penalty must not lead this Court or other courts to import profound differences of opinion over the meaning of the Eighth Amendment to the United States Constitution into the domain of administrative law.

The judgment of the Court of Appeals is

Reversed.

JUSTICE BRENNAN, concurring.

Today the Court holds that individual decisions of the Food and Drug Administration not to take enforcement action in response to citizen requests are presumptively not reviewable under the Administrative Procedure Act, 5 U. S. C. §§ 701–706. I concur in this decision. This general presumption is based on the view that, in the normal course of events, Congress intends to allow broad discretion for its administrative agencies to make particular enforcement decisions, and there often may not exist readily discernible "law to apply" for courts to conduct judicial review of nonenforcement decisions. See *Citizens to Preserve Overton Park* v. *Volpe*, 401 U. S. 402, 410 (1971).

I also agree that, despite this general presumption, "Congress did not set agencies free to disregard legislative direction in the statutory scheme that the agency administers." *Ante*, at 833. Thus the Court properly does not decide today that nonenforcement decisions are unreviewable in cases where (1) an agency flatly claims that it has no statutory jurisdiction to reach certain conduct, *ante*, at 833, n. 4; (2) an agency engages in a pattern of nonenforcement of clear statutory language, as in *Adams* v. *Richardson*, 156 U. S. App. D. C. 267, 480 F. 2d 1159 (1973) (en banc), *ante*, at 833, n. 4; (3) an agency has refused to enforce a regulation lawfully promulgated and still in effect, *ante*, at 836;[1] or (4) a nonenforcement decision violates constitutional rights, *ante*, at 838. It is possible to imagine other nonenforcement decisions made for entirely illegitimate reasons, for example, nonenforcement in return for a bribe, judicial review of which would not be foreclosed by the nonreviewability presumption. It may be presumed that Congress does not intend administrative agencies, agents of Congress' own creation, to ignore clear jurisdictional, regulatory, statutory, or constitutional commands, and in some circumstances including those listed above the statutes or regulations at issue may well provide "law to apply" under 5 U. S. C. § 701(a)(2). Individual, isolated nonenforcement decisions, however, must be made by hundreds of agencies each day. It is entirely permissible to presume that Congress has not intended courts to review such mundane matters, absent either some indication of congressional intent to the contrary or proof of circumstances such as those set out above.

On this understanding of the scope of today's decision, I join the Court's opinion.[2]

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[1] Cf. *Motor Vehicle Manufacturers Assn.* v. *State Farm Mutual Ins. Co.*, 463 U. S. 29, 40–44 (1983) (failure to revoke lawfully a previously promulgated rule is reviewable under the APA).

[2] I adhere to my view that the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amend-

JUSTICE MARSHALL, concurring in the judgment.

Easy cases at times produce bad law, for in the rush to reach a clearly ordained result, courts may offer up principles, doctrines, and statements that calmer reflection, and a fuller understanding of their implications in concrete settings, would eschew. In my view, the "presumption of unreviewability" announced today is a product of that lack of discipline that easy cases make all too easy. The majority, eager to reverse what it goes out of its way to label as an "implausible result," *ante*, at 827, not only does reverse, as I agree it should, but along the way creates out of whole cloth the notion that agency decisions not to take "enforcement action" are unreviewable unless Congress has rather specifically indicated otherwise. Because this "presumption of unreviewability" is fundamentally at odds with rule-of-law principles firmly embedded in our jurisprudence, because it seeks to truncate an emerging line of judicial authority subjecting enforcement discretion to rational and principled constraint, and because, in the end, the presumption may well be indecipherable, one can only hope that it will come to be understood as a relic of a particular factual setting in which the full implications of such a presumption were neither confronted nor understood.

I write separately to argue for a different basis of decision: that refusals to enforce, like other agency actions, are reviewable in the absence of a "clear and convincing" congressional intent to the contrary, but that such refusals warrant deference when, as in this case, there is nothing to suggest

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ments, see *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976) (BRENNAN, J., dissenting). My concurrence here should not be misread as an expression of approval for the use of lethal injections to effect capital punishment as an independent matter. The Court is correct, however, that "profound differences of opinion over the meaning of the Eighth Amendment" should not influence our consideration of a question purely of statutory administrative law. *Ante*, at 838.

that an agency with enforcement discretion has abused that discretion.

I

In response to respondents' petition, the FDA Commissioner stated that the FDA would not pursue the complaint

> "under our inherent discretion to decline to pursue certain enforcement matters. The unapproved use of approved drugs is an area in which the case law is far from uniform. Generally, enforcement proceedings in this area are initiated only when there is a serious danger to the public health or a blatant scheme to defraud. We cannot conclude that those dangers are present under State lethal injection laws . . . . [W]e decline, as a matter of enforcement discretion, to pursue supplies of drugs under State control that will be used for execution by lethal injection."

The FDA may well have been legally required to provide this statement of basis and purpose for its decision not to take the action requested. Under the Administrative Procedure Act, such a statement is required when an agency denies a "written application, petition, or other request of an interested person made in connection with any agency proceedings."[1] 5 U. S. C. § 555(e). Whether this written explanation was legally required or not, however, it does provide a sufficient basis for holding, *on the merits*, that the FDA's refusal to grant the relief requested was within its discretion.

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[1] All Members of the Court in *Dunlop* v. *Bachowski*, 421 U. S. 560 (1975), agreed that a statement of basis and purpose was required for the denial of the enforcement request at issue there. See *id.*, at 571–575; *id.*, at 594 (REHNQUIST, J., concurring in result in part and dissenting in part). Given the revisionist view the Court takes today of *Dunlop*, perhaps these statements too are to be limited to the specific facts out of which they emerged. Yet the Court's suggestion that review is proper when the agency asserts a lack of jurisdiction to act, see *ante*, at 833, n. 4, or some other basis inconsistent with congressional intent, would seem to presuppose the existence of a statement of basis and purpose explaining the basis for denial of enforcement action.

First, respondents on summary judgment neither offered nor attempted to offer any evidence that the reasons for the FDA's refusal to act were other than the reasons stated by the agency. Second, as the Court correctly concludes, the FDCA is not a mandatory statute that requires the FDA to prosecute all violations of the Act. Thus, the FDA clearly has significant discretion to choose which alleged violations of the Act to prosecute. Third, the basis on which the agency chose to exercise this discretion—that other problems were viewed as more pressing—generally will be enough to pass muster. Certainly it is enough to do so here, where the number of people currently affected by the alleged misbranding is around 200, and where the drugs are integral elements in a regulatory scheme over which the States exercise pervasive and direct control.

When a statute does not mandate full enforcement, I agree with the Court that an agency is generally "far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities." *Ante*, at 831–832. As long as the agency is choosing how to allocate finite enforcement resources, the agency's choice will be entitled to substantial deference, for the choice among valid alternative enforcement policies is precisely the sort of choice over which agencies generally have been left substantial discretion by their enabling statutes. *On the merits*, then, a decision not to enforce that is based on valid resource-allocation decisions will generally not be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U. S. C. § 706(2)(A). The decision in this case is no exception to this principle.

The Court, however, is not content to rest on this ground. Instead, the Court transforms the arguments for deferential review on the merits into the wholly different notion that "enforcement" decisions are presumptively unreviewable altogether—unreviewable whether the resource-allocation rationale is a sham, unreviewable whether enforcement is declined out of vindictive or personal motives, and unreviewable whether the agency has simply ignored the request for enforcement. But cf. *Logan* v. *Zimmerman Brush Co.*, 455 U. S. 422 (1982) (due process and equal protection may prevent agency from ignoring complaint). But surely it is a far cry from asserting that agencies must be given substantial leeway in allocating enforcement resources among valid alternatives to suggesting that agency enforcement decisions are presumptively unreviewable *no matter what factor caused the agency to stay its hand.*

This "presumption of unreviewability" is also a far cry from prior understandings of the Administrative Procedure Act. As the Court acknowledges, the APA presumptively entitles any person "adversely affected or aggrieved by agency action," 5 U. S. C. § 702—which is defined to include the "failure to act," 5 U. S. C. § 551 (13)—to judicial review of that action. That presumption can be defeated if the substantive statute precludes review, § 701(a)(1), or if the action is committed to agency discretion *by law,* § 701(a)(2), but as Justice Harlan's opinion in *Abbott Laboratories* v. *Gardner,* 387 U. S. 136 (1967), made clear in interpreting the APA's judicial review provisions:

> "The legislative material elucidating [the APA] manifests a congressional intention that it cover a broad spectrum of administrative actions, and this Court has echoed that theme by noting that the Administrative Procedure Act's 'generous review provisions' must be given a 'hospitable' interpretation. . . . [O]nly upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Id.*, at 140–141 (citations omitted; footnote omitted).

See generally H. R. Rep. No. 1980, 79th Cong., 2d Sess., 41 (1946) (to preclude APA review, a statute "must upon its face give clear and convincing evidence of an intent to withhold it"); cf. *Moog Industries, Inc.* v. *FTC*, 355 U. S. 411, 414 (1958) (Federal Trade Commission decisions to prosecute are reviewable and can be overturned when "patent abuse of discretion" demonstrated).[2] Rather than confront *Abbott Laboratories*, perhaps the seminal case on judicial review under the APA, the Court chooses simply to ignore it.[3] Instead, to support its new-found "presumption of unreviewability," the Court resorts to completely undefined and unsubstantiated references to "tradition," see *ante*, at 831, and to citation of four cases. See *United States* v. *Batchelder*, 442 U. S. 114 (1979); *United States* v. *Nixon*, 418 U. S. 683 (1974); *Vaca* v. *Sipes*, 386 U. S. 171 (1967); *Confiscation Cases*, 7 Wall. 454 (1869).[4] Because the Court's "tradition" rationale, which flies in the face of *Abbott Laboratories*, stands as a flat, unsupported *ipse dixit*, these four cases form the only doctrinal foundation for the majority's presumption of unreviewability.

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[2] The Senate Committee Report accompanying the APA stated: "The mere filing of a petition does not require an agency to grant it, or to hold a hearing, or engage in any other public rule making proceedings. The refusal of an agency to grant the petition or to hold rule making proceedings, therefore, would not per se be subject to judicial reversal." S. Doc. No. 248, 79th Cong., 2d Sess., 201 (1946). As Judge McGowan has observed, "this language implies that judicial review *would* sometimes be available in the circumstances mentioned" in the Report. *Natural Resources Defense Council, Inc.* v. *SEC*, 196 U. S. App. D. C. 124, 136, n. 14, 606 F. 2d 1031, 1043, n. 14 (1979).

[3] The Court did not ignore *Abbott Laboratories* in *Southern R. Co.* v. *Seaboard Allied Milling Corp.*, 442 U. S. 444, 454, 462–463 (1979), a denial of enforcement case that required "clear and convincing evidence" of congressional intent to preclude review of the failure to investigate a complaint.

[4] It is ironic that *Vaca* v. *Sipes* and the *Confiscation Cases* were cited by the Government in its brief in *Dunlop* when it unsuccessfully pressed the very proposition accepted today: that agency enforcement decisions are presumptively unreviewable. See Brief for Petitioner in *Dunlop* v. *Bachowski*, O. T. 1974, No. 74–466, pp. 25–31.

Yet these cases hardly support such a broad presumption with respect to agency refusal to take enforcement action. The only one of these cases to involve administrative action, *Vaca* v. *Sipes*, suggests, in dictum, that the General Counsel of the National Labor Relations Board has unreviewable discretion to refuse to initiate an unfair labor practice complaint. To the extent this dictum is sound, later cases indicate that unreviewability results from the particular structure of the National Labor Relations Act and the explicit statutory intent to withdraw review found in 29 U. S. C. § 153(d), rather than from some general "presumption of unreviewability" of enforcement decisions. See *NLRB* v. *Sears, Roebuck & Co.*, 421 U. S. 132, 138 (1975).[5] Neither *Vaca* nor *Sears, Roebuck* discusses the APA. The other three cases—*Batchelder, Nixon*, and the *Confiscation Cases*—all involve prosecutorial discretion to enforce the criminal law. *Batchelder* does not maintain that such discretion is unreviewable, but only that the mere existence of prosecutorial discretion does not violate the Constitution. The *Confiscation Cases*, involving suits to confiscate property used in aid of rebellion, hold that, where the United States brings a criminal action that is "wholly for the benefit of the United States," 7 Wall., at 455, a person who provides information leading to the action has no "vested" or absolute right to demand, "so far as the interests of the United States are concerned," *id.*, at 458, that the action be maintained. The half-sentence cited from *Nixon*, which states that the Executive has "absolute discretion to decide whether to prosecute a case," 418 U. S., at 693, is the only apparent support the Court actually offers for even the limited notion that prosecutorial discretion in the criminal area is unreviewable. But that half-sentence is of course misleading, for *Nixon* held it an abuse of that discretion to attempt to exercise it contrary to validly promulgated regulations. Thus, *Nixon* actually stands for a very different proposition than the one for which the Court cites it: faced with a specific claim of abuse of prosecutorial discretion, *Nixon* makes clear that courts are not powerless to intervene. And none of the other prosecutorial discretion cases upon which the Court rests involved a claim that discretion had been abused in some specific way.

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[5] Cf. *Southern R. Co.* v. *Seaboard Allied Milling Corp., supra* (concluding, after extensive examination of history and structure of Act, that agency decisions not to investigate under § 15(8)(a) of the Interstate Commerce Act are unreviewable).

Moreover, for at least two reasons it is inappropriate to rely on notions of prosecutorial discretion to hold agency inaction unreviewable. First, since the dictum in *Nixon*, the Court has made clear that prosecutorial discretion is not as unfettered or unreviewable as the half-sentence in *Nixon* suggests. As one of the leading commentators in this area has noted, "the case law since 1974 is strongly on the side of reviewability." 2 K. Davis, Administrative Law § 9:6, p. 240 (1979). In *Blackledge* v. *Perry*, 417 U. S. 21, 28 (1974), instead of invoking notions of "absolute" prosecutorial discretion, we held that certain potentially vindictive exercises of prosecutorial discretion were both reviewable and impermissible. The "retaliatory use" of prosecutorial power is no longer tolerated. *Thigpen* v. *Roberts*, 468 U. S. 27, 30 (1984). Nor do prosecutors have the discretion to induce guilty pleas through promises that are not kept. *Blackledge* v. *Allison*, 431 U. S. 63 (1977); *Santobello* v. *New York*, 404 U. S. 257, 262 (1971). And in rejecting on the merits a claim of improper prosecutorial conduct in *Bordenkircher* v. *Hayes*, 434 U. S. 357 (1978), we clearly laid to rest any notion that prosecutorial discretion is unreviewable no matter what the basis is upon which it is exercised:

> "There is no doubt that the breadth of discretion that our country's legal system vests in prosecuting attorneys carries with it the potential for both individual and institutional abuse. And broad though that discretion may

> be, there are undoubtedly constitutional limits upon its exercise." *Id.*, at 365.

See also *Wayte* v. *United States*, *ante*, at 608. Thus, even in the area of criminal prosecutions, prosecutorial discretion is not subject to a "presumption of unreviewability." See generally Vorenberg, Decent Restraint of Prosecutorial Power, 94 Harv. L. Rev. 1521, 1537–1543 (1981). If a plaintiff makes a sufficient threshold showing that a prosecutor's discretion has been exercised for impermissible reasons, judicial review is available.

Second, arguments about prosecutorial discretion do not necessarily translate into the context of agency refusals to act. "In appropriate circumstances the Court has made clear that traditions of prosecutorial discretion do not immunize from judicial scrutiny cases in which the enforcement decisions of an administrator were motivated by improper factors or were otherwise contrary to law." *Marshall* v. *Jerrico, Inc.*, 446 U. S. 238, 249 (1980) (citations omitted). Criminal prosecutorial decisions vindicate only intangible interests, common to society as a whole, in the enforcement of the criminal law. The conduct at issue has already occurred; all that remains is society's general interest in assuring that the guilty are punished. See *Linda R. S.* v. *Richard D.*, 410 U. S. 614, 619 (1973) ("[A] private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another"). In contrast, requests for administrative enforcement typically seek to prevent concrete and future injuries that Congress has made cognizable—injuries that result, for example, from misbranded drugs, such as alleged in this case, or unsafe nuclear powerplants, see, *e. g.*, *Florida Power & Light Co.* v. *Lorion*, *ante*, p. 729—or to obtain palpable benefits that Congress has intended to bestow—such as labor union elections free of corruption, see *Dunlop* v. *Bachowski*, 421 U. S. 560 (1975). Entitlements to receive these benefits or to be free of these injuries often run to specific classes of individuals whom Congress has singled out as statutory beneficiaries. The interests at stake in review of administrative enforcement decisions are thus more focused and in many circumstances more pressing than those at stake in criminal prosecutorial decisions. A request that a nuclear plant be operated safely or that protection be provided against unsafe drugs is quite different from a request that an individual be put in jail or his property confiscated as punishment for past violations of the criminal law. Unlike traditional exercises of prosecutorial discretion, "the decision to enforce—or not to enforce—may itself result in significant burdens on a . . . statutory beneficiary." *Marshall* v. *Jerrico, Inc.*, *supra*, at 249.

Perhaps most important, the *sine qua non* of the APA was to alter inherited judicial reluctance to constrain the exercise of discretionary administrative power—to rationalize and make fairer the exercise of such discretion. Since passage of the APA, the sustained effort of administrative law has been to "continuously narro[w] the category of actions considered to be so discretionary as to be exempted from review." Shapiro, Administrative Discretion: The Next Stage, 92 Yale L. J. 1487, 1489, n. 11 (1983). Discretion may well be necessary to carry out a variety of important administrative functions, but discretion can be a veil for laziness, corruption, incompetency, lack of will, or other motives, and for that reason *"the presence of discretion should not bar a court from considering a claim of illegal or arbitrary use of discretion."* L. Jaffe, Judicial Control of Administrative Action 375 (1965). Judicial review is available under the APA in the absence of a clear and convincing demonstration that Congress intended to preclude it precisely so that agencies, whether in rulemaking, adjudicating, acting or failing to act, do not become stagnant backwaters of caprice and lawlessness. "Law has reached its finest moments when it has freed man from the unlimited discretion of some ruler, some civil or military official, some bureaucrat." *United States* v. *Wunderlich*, 342 U. S. 98, 101 (1951).

For these and other reasons,[6] reliance on prosecutorial discretion, itself a fading talisman, to justify the unreviewabilty of agency inaction is inappropriate. See generally Stewart & Sunstein, Public Programs and Private Rights, 95 Harv. L. Rev. 1195, 1285–1286, n. 386 (1982) (discussing differences between agency inaction and prosecutorial discretion); Note, Judicial Review of Administrative Inaction, 83 Colum. L. Rev. 627, 658–661 (1983) (same). To the extent arguments about traditional notions of prosecutorial discretion have any force at all in this context, they ought to apply only to an agency's decision to decline to seek penalties against an individual for past conduct, not to a decision to refuse to investigate or take action on a public health, safety, or welfare problem.

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[6] Legal historians have suggested that the notion of prosecutorial discretion developed in England and America largely because private prosecutions were simultaneously available at the time. See Langbein, Controlling Prosecutorial Discretion in Germany, 41 U. Chi. L. Rev. 439, 443–446 (1974). Private enforcement of regulatory statutes, such as the FDCA, is of course largely unavailable.

In addition, scholars have noted that the tradition of unreviewability of prosecutor's decisions developed at a time when virtually all executive action was considered unreviewable. In asking what accounts for this "tradition," one scholar offered the following rhetorical questions:

"Is it because the tradition became settled during the nineteenth century when courts were generally assuming that judicial intrusion into any administration would be unfortunate? Is it because the tradition became settled while the Supreme Court was actuated by its 1840 remark that 'The interference of the Courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief.' [citing *Decatur* v. *Paulding*, 14 Pet. 497, 516 (1840)]. Is it because the tradition became settled before the courts made the twentieth-century discovery that the courts can interfere with executive action to protect against abuses but at the same time can avoid taking over the executive function? Is it because the tradition became settled before the successes of the modern system of *limited* judicial review became fully recognized?

"On the basis of what the courts know today about leaving administration to administrators but at the same time providing an effective check to protect against abuses, should the courts not take a fresh look at the tradition that prevents them from reviewing the prosecuting function?" K. Davis, Discretionary Justice 211 (1969) (footnote omitted).

II

The "tradition" of unreviewability upon which the majority relies is refuted most powerfully by a firmly entrenched body of lower court case law that holds reviewable various agency refusals to act.[7] This case law recognizes that attempting to

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[7] See, *e. g.*, *Bargmann* v. *Helms*, 230 U. S. App. D. C. 164, 715 F. 2d 638 (1983); *Natural Resources Defense Council, Inc.* v. *EPA*, 683 F. 2d 752, 753, 767–768 (CA3 1982); *WWHT, Inc.* v. *FCC*, 211 U. S. App. D. C. 218, 656 F. 2d 807 (1981); *Carpet, Linoleum & Resilient Tile Layers, Local Union No. 419* v. *Brown*, 656 F. 2d 564 (CA10 1981); *Natural Resources Defense Council, Inc.* v. *SEC*, 196 U. S. App. D. C. 124, 606 F. 2d 1031 (1979); *British Airways Board* v. *Port Authority of New York*, 564 F. 2d 1002, 1012–1013 (CA2 1977); *Pennsylvania* v. *National Assn. of Flood Insurers*, 520 F. 2d 11 (CA3 1975); *REA Express, Inc.* v. *CAB*, 507 F. 2d 42 (CA2 1974); *Davis* v. *Romney*, 490 F. 2d 1360 (CA3 1974); *Adams* v. *Richardson*, 156 U. S. App. D. C. 267, 480 F. 2d 1159 (1973) (en banc); *International Harvester Co.* v. *Ruckelshaus*, 155 U. S. App. D. C. 411, 478 F. 2d 615 (1973); *Rockbridge* v. *Lincoln*, 449 F. 2d 567 (CA9 1971); *Environmental Defense Fund, Inc.* v. *Ruckelshaus*, 142 U. S. App. D. C. 74, 439 F. 2d 584 (1971); *Environmental Defense Fund, Inc.* v. *Hardin*, 138 U. S. App. D. C. 391, 428 F. 2d 1093 (1970); *Medical Committee for Human Rights* v. *SEC*, 139 U. S. App. D. C. 226, 432 F. 2d 659 (1970), vacated as moot, 404 U. S. 403 (1972); *Trailways of New England, Inc.* v. *CAB*, 412 F. 2d 926 (CA1 1969); *International Union, United Auto., Aero. & Agric. Implement Workers* v. *NLRB*, 427 F. 2d 1330 (CA6 1970); *Public Citizen Health Research Group* v. *Auchter*, 554 F. Supp. 242 (DC 1983), rev'd in part, 226 U. S. App. D. C. 413, 702 F. 2d 1150 (1983); *Sierra Club* v. *Gorsuch*, 551 F. Supp. 785 (ND Cal. 1982); *Hoffmann-LaRoche, Inc.* v. *Weinberger*, 425 F. Supp. 890 (DC 1975); *NAACP* v. *Levi*, 418 F. Supp. 1109 (DC 1976); *Guerrero* v. *Garza*, 418 F. Supp. 182 (WD Wis. 1976); *Souder* v. *Brennan*, 367 F. Supp. 808, 811 (DC 1973); *City-Wide Coalition Against Childhood Lead Paint Poisoning* v. *Philadelphia Housing Auth.*, 356 F. Supp. 123 (ED Pa. 1973); *American Public Health Assn.* v. *Veneman*, 349 F. Supp. 1311 (DC 1972).

To be sure, some of these cases involved the refusal to initiate rulemaking proceedings, and the majority expressly disavows any claim that draw a line for purposes of judicial review between affirmative exercises of coercive agency power and negative agency refusals to act, see *ante*, at 832, is simply untenable; one of the very purposes fueling the birth of administrative agencies was the reality that governmental refusal to act could have just as devastating an effect upon life, liberty, and the pursuit of happiness as coercive governmental action. As Justice Frankfurter, a careful and experienced student of administrative law, wrote for this Court, "any distinction, as such, between 'negative' and 'affirmative' orders, as a touchstone of jurisdiction to review [agency action] serves no useful purpose." *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 143 (1939).[8] The lower courts, facing

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its presumption of unreviewability applies to such refusals. See *ante*, at 825, n. 2. But the majority offers no explanation of how an enforcement request that seeks protection of the public or statutory beneficiaries from present and future concrete harms, or from loss of deserved benefits, implicates considerations substantially different from those at stake in judicial review of the refusal to initiate rulemaking proceedings.

[8] Justice Frankfurter went to some length in *Rochester Telephone* to expose the fallacy of any purported distinction between agency action and inaction:

"'[N]egative order' and 'affirmative order' are not appropriate terms of art. . . . 'Negative' has really been an obfuscating adjective in that it implied a search for a distinction—non-action as against action—which does not involve the real considerations on which rest, as we have seen, the reviewability of Commission orders within the framework of its discretionary authority and within the general criteria of justiciability. 'Negative' and 'affirmative,' in the context of these problems, is as unilluminating and mischief-making a distinction as the outmoded line between 'nonfeasance' and 'misfeasance.'

". . . An order of the Commission dismissing a complaint on the merits and maintaining the *status quo* is an exercise of administrative function, no more and no less, than an order directing some change in status. . . . In the application of relevant canons of judicial review an order of the Commission directing the adoption of a practice might raise considerations absent from a situation where the Commission merely allowed such a practice to continue. *But this bears on the disposition of a case and should not control jurisdiction.*" 307 U. S., at 140–142 (emphasis added; footnotes omitted).

the problem of agency inaction and its concrete effects more regularly than do we, have responded with a variety of solutions to assure administrative fidelity to congressional objectives: a demand that an agency explain its refusal to act, a demand that explanations given be further elaborated, and injunctions that action "unlawfully withheld or unreasonably delayed," 5 U. S. C. § 706, be taken. See generally Stewart & Sunstein, 95 Harv. L. Rev., at 1279. Whatever the merits of any particular solution, one would have hoped the Court would have acted with greater respect for these efforts by responding with a scalpel rather than a blunderbuss.

To be sure, the Court no doubt takes solace in the view that it has created only a "presumption" of unreviewability, and that this "presumption may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers." *Ante*, at 832–833. But this statement implies far too narrow a reliance on positive law, either statutory or constitutional, see *ibid.*, as the sole source of limitations on agency discretion not to enforce. In my view, enforcement discretion is also channelled by traditional background understandings against which the APA was enacted and which Congress hardly could be thought to have intended to displace in the APA.[9] For example, a refusal to enforce that stems from a conflict of interest, that is the result of a bribe, vindictiveness or retaliation, or that traces to personal or other corrupt motives ought to be judicially remediable.[10] Even in the absence of statutory "guidelines" precluding such factors as bases of decision, Congress should not be presumed to have departed from principles of rationality and fair process in enacting the APA.[11] Moreover, the agency may well narrow its own enforcement discretion through historical practice, from which it should arguably not depart in the absence of explanation, or through regulations and informal action. Traditional principles of rationality and fair process do offer "meaningful standards" and "law to apply" to an agency's decision not to act, and no presumption of unreviewability should be allowed to trump these principles.

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[9] The Court cites 5 K. Davis, Administrative Law § 28:5 (1984), for the proposition that the APA did not alter the "common law" of judicial review of agency action; Davis' correct statement ought to make clear that traditional principles of fair and rational decisionmaking were incorporated into, rather than obliterated by, the APA, and that judicial review is available to assure that agency action, including inaction, is consistent with these principles. See also *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U. S. 353, 378 (1982) ("[W]e must examine Congress' perception of the law that it was shaping or reshaping").

[10] "A scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into

Perhaps the Court's reference to guidance from the "substantive statute" is meant to encompass such concerns and to allow the "common law" of judicial review of agency action to provide standards by which inaction can be reviewed. But in that case I cannot fathom what content the Court's "presumption of unreviewability" might have. If inaction can be reviewed to assure that it does not result from improper abnegation of jurisdiction, from complete abdication of statutory responsibilities, from violation of constitutional rights, or from factors that offend principles of rational and fair administrative process, it would seem that a court must always inquire into the reasons for the agency's action before deciding whether the presumption applies.[12] As Judge Friendly said many years ago, review of even a decision over which substantial administrative discretion exists would then be available to determine whether that discretion had been

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the prosecutorial decision and in some contexts raise serious constitutional questions." *Marshall* v. *Jerrico, Inc.*, 446 U. S. 238, 249–250 (1980).

[11] Indeed, "[t]he more general and powerful the background understanding, the less likely it is to have been stated explicitly by the legislature, even if the legislature in fact shares that understanding." Stewart & Sunstein, Public Programs and Private Rights, 95 Harv. L. Rev. 1195, 1231 (1982).

[12] When an agency asserts that a refusal to enforce is based on enforcement priorities, it may be that, to survive summary judgment, a plaintiff must be able to offer some basis for calling this assertion into question or for justifying his inability to do so.

abused because the decision was "made without a rational explanation, inexplicably departed from established policies, or rested . . . on other considerations that Congress could not have intended to make relevant." *Wong Wing Hang* v. *INS*, 360 F. 2d 715, 719 (CA2 1966). In that event, we would not be finding enforcement decisions unreviewable, but rather would be reviewing them on the merits, albeit with due deference, to assure that such decisions did not result from an abuse of discretion.

That is the basis upon which I would decide this case. Under § 706(A)(2) and *Abbott Laboratories* v. *Gardner*, 387 U. S. 136 (1967), agency action, including the failure to act, is reviewable to assure that it is not "arbitrary, capricious, or an abuse of discretion," unless Congress has manifested a clear and convincing intent to preclude review. Review of enforcement decisions must be suitably deferential in light of the necessary flexibility the agencies must have in this area, but at least when "enforcement" inaction allegedly deprives citizens of statutory benefits or exposes them to harms against which Congress has sought to provide protection, review must be on the merits to ensure that the agency is exercising its discretion within permissible bounds. See Berger, Administrative Arbitrariness: A Synthesis, 78 Yale L. J. 965 (1969); L. Jaffe, Judicial Control of Administrative Action 375 (1965).

III

The problem of agency refusal to act is one of the pressing problems of the modern administrative state, given the enormous powers, for both good and ill, that agency inaction, like agency action, holds over citizens. As *Dunlop* v. *Bachowski*, 421 U. S. 560 (1975), recognized, the problems and dangers of agency inaction are too important, too prevalent, and too multifaceted to admit of a single facile solution under which "enforcement" decisions are "presumptively unreviewable." Over time, I believe the approach announced today will come to be understood, not as mandating that courts cover their eyes and their reasoning power when asked to review an agency's failure to act, but as recognizing that courts must approach the substantive task of reviewing such failures with appropriate deference to an agency's legitimate need to set policy through the allocation of scarce budgetary and enforcement resources. Because the Court's approach, if taken literally, would take the courts out of the role of reviewing agency inaction in far too many cases, I join only the judgment today.

BALL *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 84-5004. Argued January 9, 1985—Decided March 26, 1985

Petitioner, a previously convicted felon, was arrested when the police found him in possession of another person's revolver that was reported missing; he reportedly threatened a neighbor with the revolver, and tried unsuccessfully to sell it. Petitioner was then indicted on charges of receiving a firearm in violation of 18 U. S. C. § 922(h)(1) and for possessing it in violation of 18 U. S. C. App. § 1202(a)(1). He was convicted in Federal District Court on both counts and sentenced to consecutive terms of imprisonment on the respective counts. The Court of Appeals remanded the case to the District Court with instructions to modify the sentences to make them concurrent.

Held: Congress did not intend a convicted felon, in petitioner's position, to be punished under both § 922(h) and § 1202(a)(1). Congress recognized that a felon who receives a firearm inevitably also possesses it, and therefore did not intend to subject that person to two convictions for the same criminal act; the legislative history supports this reading of congressional intent. While the Government may seek a multiple-count indictment against a felon for violations of §§ 922(h) and 1202(a)(1) involving the same weapon where a single act establishes the receipt and the possession, the defendant may not suffer two convictions or sentences on that indictment. If the jury returns guilty verdicts for each count, the trial court should enter judgment on only one count. The remedy of ordering one of the sentences to be served concurrently with the other cannot be squared with Congress' intention. Pp. 859–865.

734 F. 2d 965, vacated and remanded.

BURGER, C. J., delivered the opinion of the Court, in which BRENNAN, WHITE, BLACKMUN, REHNQUIST, and O'CONNOR, JJ., joined. MARSHALL, J., concurred in the judgment. STEVENS, J., filed an opinion concurring in the judgment, *post*, p. 867. POWELL, J., took no part in the decision of the case.

Jo S. Widener, by appointment of the Court, 469 U. S. 928, argued the cause and filed briefs for petitioner.

Andrew J. Pincus argued the cause *pro hac vice* for the United States. With him on the brief were *Solicitor General*

Lee, Assistant Attorney General Trott, Deputy Solicitor General Frey, Robert J. Erickson, and *Thomas E. Booth.*

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to decide whether a felon possessing a firearm may be convicted and concurrently sentenced under 18 U. S. C. § 922(h)(1) for receiving that firearm, and under 18 U. S. C. App. § 1202(a)(1) for possessing the same weapon. 469 U. S. 816 (1984).

I

After driving around Honaker, Virginia, with several acquaintances, including petitioner Truman Ball, Hubert Romans discovered that his .32-caliber nickel-plated Rossi revolver was missing from the back seat of his car.[1] He reported the incident to the Russell County Sheriff's Department. Subsequently, a neighbor notified the Sheriff that Ball had threatened him with a pistol matching the description of Romans' revolver. Later that same day, the police located Ball at another neighbor's home where Ball had tried unsuccessfully to sell the revolver. When the police told Ball he was under arrest, Ball fled but was promptly apprehended with Romans' revolver in his possession.

Ball, a previously convicted felon,[2] was indicted on charges of receiving a firearm shipped in interstate commerce, 18 U. S. C. §§ 922(h)(1) and 924(a), and possessing that firearm, 18 U. S. C. App. § 1202(a)(1).[3] It is conceded that both counts rest on the same conduct. Ball was convicted on both counts[4] by a jury in the Western District of Virginia and sentenced to consecutive terms of three years' imprisonment on the receipt count and two years' imprisonment on the possession count, the latter sentence suspended with two years' probation.

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[1] In October 1981, Elliot Brothers of South Carolina had shipped the revolver to McGlothlin's Store in Honaker, Virginia. On February 22, 1982, McGlothlin sold the gun to Romans.

[2] At the outset of the trial, the parties stipulated that Ball previously had been convicted of the state felony of threatening a dwelling house. App. 2–3.

[3] See Appendix to this opinion for the complete texts of the relevant statutes.

On appeal Ball challenged the validity of the consecutive sentences. The Government conceded that under *United States* v. *Burton*, 629 F. 2d 975 (CA4 1980), cert. denied, 450 U. S. 968 (1981), consecutive sentences could not be imposed for unlawful receipt and unlawful possession of the same firearm, when the unlawful possession was incident to its unlawful receipt. The Court of Appeals accepted this concession and adhered to its statement in *Burton* that "Congress in these firearms statutes created separate offenses, but did not authorize pyramiding penalties." 734 F. 2d 965, 966 (CA4 1984) (citing *Burton*, *supra*, at 977). The Court of Appeals remanded the case to the District Court with instructions to modify the sentences to make them concurrent.

The application of the firearms statutes, § 922(h)(1) and § 1202(a)(1), charging a convicted felon with receiving and possessing the same gun, has produced conflicting decisions among the Courts of Appeals.[5] We granted certiorari to resolve this conflict. We reverse.

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[4] The chain of sale described in n. 1, *supra*, established the interstate commerce connection required by the firearms statutes. See *Barrett* v. *United States*, 423 U. S. 212 (1976); *Scarborough* v. *United States*, 431 U. S. 563 (1977).

[5] The Tenth Circuit has held that a convicted felon may be convicted and sentenced cumulatively under both statutes. *United States* v. *Larranaga*, 614 F. 2d 239, 241 (1980). The Fifth, Ninth, and District of Columbia Circuits have concluded that the Government must elect to prosecute a convicted felon under one of the statutes. *United States* v. *Larson*, 625 F. 2d 67, 69 (CA5 1980); *United States* v. *Conn*, 716 F. 2d 550, 553 (CA9 1983); *United States* v. *Girst*, 207 App. D. C. 89, 92, 645 F. 2d 1014, 1017 (1979). The Fourth Circuit has decided that a convicted felon may be convicted under both statutes, but the separate sentences must run concurrently. *United States* v. *Burton*, 629 F. 2d 975, 977–978 (1980). The Third and

II

This case requires the Court once again to resolve the "partial redundancy" of §§ 922(h) and 1202(a), provisions of Titles IV and VII, respectively, of the Omnibus Crime Control and Safe Streets Act of 1968. *E. g., United States* v. *Batchelder*, 442 U. S. 114, 118 (1979); *United States* v. *Bass*, 404 U. S. 336, 341–343, and n. 9 (1971). In these two Titles of the Omnibus Act, Congress sought to control the interstate traffic and availability of firearms. Although Congress' purposes are obvious, courts understandably have had difficulty applying the overlapping provisions of the Act. This case affords an opportunity to address the application of Titles IV and VII to one set of circumstances—where a single act is relied upon to establish a convicted felon's unlawful receipt and his unlawful possession of the same firearm.[6]

A

It is clear that a convicted felon may be prosecuted simultaneously for violations of §§ 922(h) and 1202(a) involving the same firearm. This Court has long acknowledged the Government's broad discretion to conduct criminal prosecutions, including its power to select the charges to be brought in a particular case. *E. g., United States* v. *Goodwin*, 457 U. S. 368, 382 (1982); *Confiscation Cases*, 7 Wall. 454, 457–459 (1869).

Seventh Circuits have remanded cases to the District Courts in order to vacate one of the convictions and sentences. *United States* v. *Taylor*, 635 F. 2d 232, 233 (CA3 1980); *United States* v. *Martin*, 732 F. 2d 591, 593 (CA7 1984).

[6] We have no occasion to consider here whether a felon may be convicted of both offenses if he possessed a firearm on one occasion and, after giving up possession, later reacquired the gun, see, *e. g., United States* v. *Robbins*, 579 F. 2d 1151 (CA9 1978), or if he received and possessed different weapons at different times or in various places, see, *e. g., United States* v. *Vance*, 724 F. 2d 517 (CA6 1983); *United States* v. *Filipponio*, 702 F. 2d 664 (CA7 1983).

In *Batchelder*, this Court recognized that §§ 922(h) and 1202(a) proscribed similar conduct where the defendant is a convicted felon, but concluded that

> "each substantive statute, in conjunction with its own sentencing provision, operates independently of the other." 442 U. S., at 118.

This Court rejected the argument that § 1202(a) impliedly repealed § 922(h) with respect to acts covered by both provisions, noting that both the statutory language and the legislative history showed that the two provisions were to be applied independently. See *id.*, at 118–121.[7] Under these circumstances there is no bar to the Government's proceeding with prosecution simultaneously under the two statutes.[8]

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[7] Several Courts of Appeals have interpreted *Batchelder* to forbid the Government to proceed against a convicted felon in a single prosecution under §§ 922(h) and 1202(a). See, *e. g.*, *United States* v. *Larson*, *supra; United States* v. *Girst*, *supra; United States* v. *Conn*, *supra.* These courts have relied upon the statement in *Batchelder* that "when an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants," 442 U. S, at 123–124, interpreting the reference to "either" statute to require the Government to proceed under only one of the two provisions. The Court's observation was a response to the claim that the two statutes permitted excessive prosecutorial discretion because the Government could in effect choose the penalty to apply in a given case by proceeding under one statute instead of the other. The Court's reference to "either" statute merely reaffirmed the Government's discretion to charge under one statute rather than the other. The Court had no intention of restricting the Government to prosecuting for only a single offense, an issue not before the Court. This is confirmed by *Batchelder*'s conclusion that the two statutes are "each fully enforceable on [their] own terms." *Id.*, at 119.

Given this congressional design, the Double Jeopardy Clause imposes no prohibition to simultaneous prosecutions. In *Ohio* v. *Johnson*, 467 U. S. 493 (1984), this Court held that even where the Clause bars cumulative punishment for a group of offenses, "the Clause does not prohibit the State from prosecuting [the defendant] for such multiple offenses in a single prosecution." *Id.*, at 500.

[8] Indeed, in *United States* v. *Gaddis*, 424 U. S. 544 (1976), the Court concluded that "there can be no impropriety . . . for a prosecutor to file

B

To say that a convicted felon may be prosecuted simultaneously for violation of §§ 922(h) and 1202(a), however, is not to say that he may be convicted and punished for two offenses. Congress can be read as allowing charges under two different statutes with conviction and sentence confined to one. Indeed, "[a]ll guides to legislative intent," *United States* v. *Woodward*, 469 U. S. 105, 109 (1985), show that Congress intended a felon in Ball's position to be convicted and punished for only one of the two offenses if the possession of the firearm is incidental to receiving it.

This Court has consistently relied on the test of statutory construction stated in *Blockburger* v. *United States*, 284 U. S. 299, 304 (1932), to determine whether Congress intended the same conduct to be punishable under two criminal provisions. The appropriate inquiry under *Blockburger* is "whether each provision requires proof of a fact which the other does not." See, *e. g.*, *United States* v. *Woodward*, *supra*, at 107; *Albernaz* v. *United States*, 450 U. S. 333, 337 (1981); *Whalen* v. *United States*, 445 U. S. 684, 691–692 (1980). The assumption underlying the *Blockburger* rule is that Congress ordinarily does not intend to punish the same offense under two different statutes.

For purposes of applying the *Blockburger* test in this setting as a means of ascertaining congressional intent, "punishment" must be the equivalent of a criminal conviction and not simply the imposition of sentence. Congress could not have intended to allow two convictions for the same conduct, even if sentenced under only one; Congress does not create criminal offenses having no sentencing component. See *United States* v. *Hudson & Goodwin*, 7 Cranch 32, 34 (1812); *Tennessee* v. *Davis*, 100 U. S. 257, 275 (1880) (Clifford, J., dissent-

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an information containing counts charging violations of" several different provisions of the federal bank robbery statute where there is evidence to support the charges, even though the defendant could not in the end stand convicted of both offenses. *Id.*, at 550.

ing). Cf. Fed. Rule Crim. Proc. 32(b)(1), which provides that the sentence is a necessary component of a "judgment of conviction."

Applying this rule to the firearms statutes, it is clear that Congress did not intend to subject felons to two convictions; proof of illegal receipt of a firearm *necessarily* includes proof of illegal possession of that weapon. "[W]hen received, a firearm is necessarily possessed." *United States* v. *Martin*, 732 F. 2d 591, 592 (CA7 1984).[9] In other words, Congress seems clearly to have recognized that a felon who receives a firearm must also possess it, and thus had no intention of subjecting that person to two convictions for the same criminal act.

The legislative history of §§ 922(h) and 1202(a) supports this reading of congressional intent. Titles IV and VII, enacted together as components of the Omnibus Act,[10] disclose "Congress' worry about the easy availability of firearms, especially to those persons who pose a threat to community peace." *Lewis* v. *United States*, 445 U. S. 55, 66 (1980). Accordingly, "[e]ach [Title] seeks to keep a firearm from 'any person . . . who has been convicted' of a felony . . . ." *Id.*, at 64.

Section 922(h), the receipt statute, is part of a "'carefully constructed package of gun control legislation,' which had been in existence for many years." *Batchelder*, 442 U. S., at

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[9] As the Government suggests, the converse may not be true. For example, a felon may possess a firearm without having "received" it; he may have manufactured the gun himself. Brief for United States 13–14.

[10] Four months after enacting the Omnibus Act, the same Congress amended and reenacted Titles IV and VII as part of the Gun Control Act of 1968. 82 Stat. 1213. Congress renewed its effort to prohibit felons from having weapons. See, *e. g.*, S. Rep. No. 1501, 90th Cong., 2d Sess., 22 (1968); 114 Cong. Rec. 21784 (1968) (remarks of Rep. Celler). As the Court observed in *Barrett* v. *United States*, 423 U. S., at 220, the Gun Control Act "reflects a similar concern with keeping firearms out of the hands of categories of potentially irresponsible persons, including convicted felons."

120 (quoting *Scarborough* v. *United States*, 431 U. S. 563, 570 (1977)).[11] One principal purpose of Title IV was to make "it possible to keep firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency . . . ." S. Rep. No. 1097, 90th Cong., 2d Sess., 28 (1968).

Section 1202(a), on the other hand, was a "last-minute Senate amendment" to the Omnibus Act, "hastily passed, with little discussion, no hearings, and no report." *United States* v. *Bass*, 404 U. S., at 344 (footnote omitted). The circumstances surrounding consideration of Title VII and the haste in which it was enacted may well explain why it does not dovetail neatly with the prohibition that was, at the time of its passage, already contained in Title IV.[12] Title VII was enacted as supplementary legislation; Title VII filled the gaps in and expanded the coverage of Title IV.[13] In short, we are persuaded that Congress had no intention of creating duplicative punishment for one limited class of persons falling within the overlap between the two Titles—convicted felons who receive firearms and who, by definition, possess them. The independent but overlapping statutes simply are not "directed to separate evils" under the circumstances. *Albernaz*, 450 U. S., at 343.[14]

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[11] Section 922(h) stemmed from § 2(f) of the Federal Firearms Act of 1938, which had made it unlawful for "any person who has been convicted of a crime of violence or is a fugutive *[sic]* from justice to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce . . . ," 52 Stat. 1251. Section 922(h), although maintaining § 2(f)'s operative phrase, expanded the categories of persons prohibited from receiving firearms. See Appendix to this opinion.

[12] Senator Tydings, for example, explained that "Title VII . . . is . . . primarily designed to restrict access to handguns to criminals, juveniles, and fugitives." 114 Cong. Rec. 13639 (1968). See also *id.*, at 13868, 14773 (remarks of Sen. Long). For a concise review of Title VII's surprisingly swift passage through the Congress, see *Scarborough* v. *United States*, 431 U. S. 563, 573–574 (1977); *United States* v. *Bass*, 404 U. S. 336, 344, n. 11 (1971).

[13] Each statute reaches substantial groups of people not covered by the other. Section 922(h), for example, covers persons who are under indictment for a felony, who are fugitives, and who are narcotics offenders. Section 1202(a), on the other hand, covers persons dishonorably discharged from the service, illegal aliens, and persons who have renounced their citizenship. Senator Long explained that the assortment of persons brought within the ambit of § 1202(a) reflected those responsible for the rash of assassinations and publicized murders in "recent history," which included the deaths of President Kennedy and Martin Luther King, Jr., as well as

C

Having concluded that Congress did not intend petitioner's conduct to be punishable under both §§ 922(h) and 1202(a), the only remedy consistent with the congressional intent is for the District Court, where the sentencing responsibility resides, to exercise its discretion to vacate one of the underlying convictions. The remedy of ordering one of the sentences to be served concurrently with the other cannot be squared with Congress' intention. One of the convictions, as well as its concurrent sentence, is unauthorized punishment for a separate offense. See *Missouri* v. *Hunter*, 459 U. S. 359, 368 (1983).

The second conviction, whose concomitant sentence is served concurrently, does not evaporate simply because of

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the murders of several civil rights workers in the South. 114 Cong. Rec. 14773 (1968). Only two groups—convicted felons and adjudicated mental incompetents—fall within the overlap between the two provisions. There is no suggestion in the legislative history that these persons pose a greater threat to society such that Congress thought they deserved to be punished more severely, *i. e.*, under both statutes for a single act.

[14] This appears to be the import of the Government's concession in *Taylor* v. *United States*, 624 F. 2d 1092 (CA3), vacated and remanded, 449 U. S. 895 (1980), where the petitioner's consecutive sentences for violating §§ 922(h) and 1202(a) had been upheld by the Court of Appeals under circumstances identical to those presented in this case. Before this Court, the Government acknowledged that "since receipt of a firearm will almost necessarily entail possession of that firearm . . . we agree with petitioner that it is unlikely that Congress intended to permit consecutive punishment in the circumstances presented here." Memorandum for United States in *Taylor* v. *United States*, O. T. 1980, No. 80–5187, pp. 2–3.

the concurrence of the sentence. The separate *conviction*, apart from the concurrent sentence, has potential adverse collateral consequences that may not be ignored. For example, the presence of two convictions on the record may delay the defendant's eligibility for parole or result in an increased sentence under a recidivist statute for a future offense. Moreover, the second conviction may be used to impeach the defendant's credibility and certainly carries the societal stigma accompanying any criminal conviction. See *Benton* v. *Maryland*, 395 U. S. 784, 790–791 (1969); *Sibron* v. *New York*, 392 U. S. 40, 54–56 (1968). Thus, the second conviction, even if it results in no greater sentence, is an impermissible punishment.

We emphasize that while the Government may seek a multiple-count indictment against a felon for violations of §§ 922(h) and 1202(a) involving the same weapon where a single act establishes the receipt and possession, the accused may not suffer two convictions or sentences on that indictment. If, upon the trial, the district judge is satisfied that there is sufficient proof to go to the jury on both counts, he should instruct the jury as to the elements of each offense. Should the jury return guilty verdicts for each count, however, the district judge should enter judgment on only one of the statutory offenses.

III

We hold that Congress did not intend a convicted felon, in Ball's position, to be convicted of both receiving a firearm in violation of 18 U. S. C. § 922(h), and possessing that firearm in violation of 18 U. S. C. App. § 1202(a). Accordingly, we vacate the judgment of the Court of Appeals and remand with instructions to have the District Court exercise its discretion to vacate one of the convictions.

It is so ordered.

JUSTICE MARSHALL concurs in the judgment.

JUSTICE POWELL took no part in the decision of this case.

APPENDIX TO OPINION OF THE COURT

Title 18 U. S. C. § 922(h) provides:

"It shall be unlawful for any person—

"(1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

"(2) is a fugitive from justice;

"(3) is an unlawful user of or addicted to marihuana or any depressant or stimulant drug (as defined in section 201(v) of the Federal Food, Drug, and Cosmetic Act) or narcotic drug (as defined in section 4731(a) of the Internal Revenue Code of 1954); or

"(4) has been adjudicated as a mental defective or has been committed to any mental institution;

"to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

Title 18 U. S. C. § 924(a) provides in pertinent part:

"Whoever violates any provision of this chapter . . . shall be fined not more than $5,000, or imprisoned not more than five years, or both, and shall become eligible for parole as the Board of Parole shall determine."

Title 18 U. S. C. App. § 1202(a) provides:

"Any person who—

"(1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony, or

"(2) has been discharged from the Armed Forces under dishonorable conditions, or

"(3) has been adjudged by a court of the United States or of a State or any political subdivision thereof of being mentally incompetent, or

"(4) having been a citizen of the United States has renounced his citizenship, or

"(5) being an alien is illegally or unlawfully in the United States,

"and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this

Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both."

JUSTICE STEVENS, concurring in the judgment.

The Court correctly holds that petitioner's conduct may support a conviction under either § 922(h)(1) or § 1202(a)(1), but not both. In reaching that conclusion the Court unnecessarily volunteers the opinion that "there is no bar to the Government's proceeding with prosecution simultaneously under the two statutes." *Ante*, at 860; see also *ante*, at 859. Even if that opinion were well founded, I see no reason why this Court should go out of its way to encourage prosecutors to tilt the scales of justice against the defendant by employing such tactics.

The views that JUSTICE MARSHALL expressed in his dissent in *Missouri* v. *Hunter*, 459 U. S. 359, 371–372 (1983), succinctly explain why I concur in the Court's judgment today:

> "[T]he entry of two convictions and the imposition of two sentences cannot be justified on the ground that the legislature could have simply created one crime but prescribed harsher punishment for that crime. This argument incorrectly assumes that the total sentence imposed is all that matters, and that the number of convictions that can be obtained is of no relevance to the concerns underlying the Double Jeopardy Clause.
>
> "When multiple charges are brought, the defendant is 'put in jeopardy' as to each charge. To retain his freedom, the defendant must obtain an acquittal on all charges; to put the defendant in prison, the prosecution need only obtain a single guilty verdict. The prosecution's ability to bring multiple charges increases the risk that the defendant will be convicted on one or more of those charges. The very fact that a defendant has been arrested, charged, and brought to trial on several charges may suggest to the jury that he must be guilty

of at least one of those crimes. Moreover, where the prosecution's evidence is weak, its ability to bring multiple charges may substantially enhance the possibility that, even though innocent, the defendant may be found guilty on one or more charges as a result of a compromise verdict. The submission of two charges rather than one gives the prosecution 'the advantage of offering the jury a choice—a situation which is apt to induce a doubtful jury to find the defendant guilty of the less serious offense rather than to continue the debate as to his innocence.' *Cichos* v. *Indiana*, 385 U. S. 76, 81 (1966) (Fortas, J., dissenting from dismissal of certiorari)."*

Accordingly, I concur in the judgment.

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*The following footnote is appended to the quoted passage:

"It is true that compromise is possible even under the familiar procedure whereby a lesser included offense is submitted along with a greater offense and the jury is told that it can convict on only one charge. Under the usual procedure, however, the risk of an irrational compromise is reduced by the rule that a lesser included offense will not be submitted to the jury if the element that distinguishes the two offenses is not in dispute. See, *e. g.*, *Sansone* v. *United States*, 380 U. S. 343 (1965); *United States* v. *Tsanas*, 572 F. 2d 340, 345–346 (CA2), cert. denied, 435 U. S. 995 (1978)." 459 U. S., at 372, n. 4 (MARSHALL, J., dissenting).

METROPOLITAN LIFE INSURANCE CO. ET AL. *v.* WARD ET AL.

APPEAL FROM THE SUPREME COURT OF ALABAMA

No. 83–1274. Argued October 31, 1984—Decided March 26, 1985

An Alabama statute imposes a substantially lower gross premiums tax rate on domestic insurance companies than on out-of-state (foreign) insurance companies. The statute permits foreign companies to reduce but not to eliminate the differential by investing in Alabama assets and securities. Appellant foreign insurance companies filed claims for refunds of taxes paid, contending that the statute, as applied to them, violated the Equal Protection Clause. The State Commissioner of Insurance denied the claims. On consolidated appeals to a county Circuit Court, in which several domestic companies intervened, the statute was upheld on summary judgment. The court ruled that the statute did not violate the Equal Protection Clause because, in addition to raising revenue, it served the legitimate state purposes of encouraging the formation of new insurance companies in Alabama and capital investment by foreign insurance companies in Alabama assets and securities, and that the distinction between foreign and domestic companies was rationally related to those purposes. The Alabama Court of Civil Appeals affirmed the finding as to legitimate state purposes, but remanded for an evidentiary hearing on the issue of rational relationship. On certiorari to the Alabama Supreme Court, appellants waived their rights to such an evidentiary hearing, and the court entered judgment for the State and the intervenors on appellants' equal protection challenge to the statute.

Held: The Alabama domestic preference tax statute violates the Equal Protection Clause as applied to appellants. Pp. 874–883.

(a) Under the circumstances of this case, promotion of domestic business by discriminating against nonresidents is not a legitimate state purpose. *Western & Southern Life Ins. Co.* v. *State Board of Equalization of California*, 451 U. S. 648, distinguished. Alabama's aim to promote domestic industry is purely and completely discriminatory, designed only to favor domestic industry within the State, no matter what the cost to foreign corporations also seeking to do business there. Alabama's purpose constitutes the very sort of parochial discrimination that the Equal Protection Clause was intended to prevent. A State may not constitutionally favor its own residents by taxing foreign corporations at a higher rate solely because of their residence. Although the McCarran-Ferguson Act exempts the insurance industry from Commerce Clause restrictions, it does not purport to limit the applicability of the Equal Protection Clause. Equal protection restraints are applicable even though the *effect* of the discrimination is similar to the type of burden with which the Commerce Clause also would be concerned. Pp. 876–882.

(b) Nor is the encouragement of the investment in Alabama assets and securities a legitimate state purpose. Domestic insurers remain entitled to the more favorable tax rate regardless of whether they invest in Alabama assets. Moreover, since the investment incentive provision does not enable foreign insurers to eliminate the statute's discriminatory effect, it does not cure but reaffirms the impermissible classification based solely on residence. Pp. 882–883.

447 So. 2d 142, reversed and remanded.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, and STEVENS, JJ., joined. O'CONNOR, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and REHNQUIST, JJ., joined, *post*, p. 883.

Matthew J. Zinn argued the cause for appellants. With him on the briefs was *Steven Reed*.

Warren B. Lightfoot argued the cause for appellees. With him on the brief for appellee Ward were *E. Mabry Rogers* and *Phillip E. Stano*. *Robert W. Bradford, Jr.*, and *Harry Cole* filed a brief for appellees American Educators Life Insurance Co. et al.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Connecticut et al. by *Dennis J. Roberts II*, Attorney General of Rhode Island, *Frances X. Bellotti*, Attorney General of Massachusetts, *Gregory H. Smith*, Attorney General of New Hampshire, *Joseph I. Lieberman*, Attorney General of Connecticut, *Elliot F. Gerson*, Deputy Attorney General, and *John G. Haines*, Assistant Attorney General; and for the Life Insurance Council of New York by *Peter J. Flanagan*.

Briefs of *amici curiae* urging affirmance were filed for the State of Alaska et al. by *Anthony Celebrezze, Jr.*, Attorney General of Ohio, and *Connie J. Harris*, Assistant Attorney General, *Dave Frohnmayer*, Attorney General of Oregon, *William F. Gary*, Deputy Attorney General, and *James E. Mountain, Jr.*, Solicitor General, *Jim Mattox*, Attorney General of Texas, and *Henry H. Robinson*, Assistant Attorney General; for the State of Illinois by *Neil F. Hartigan*, Attorney General, and *Patricia Rosen* and *Kathryn A. Spalding*, Assistant Attorneys General; for Allstate Insurance Co. et al. by *Duane C. Quaini;* for the Florida Association of

JUSTICE POWELL delivered the opinion of the Court.

This case presents the question whether Alabama's domestic preference tax statute, Ala. Code §§ 27–4–4 and 27–4–5 (1975), that taxes out-of-state insurance companies at a higher rate than domestic insurance companies, violates the Equal Protection Clause.

I

Since 1955,[1] the State of Alabama has granted a preference to its domestic insurance companies by imposing a substantially lower gross premiums tax rate on them than on out-of-state (foreign) companies.[2] Under the current statutory provisions, foreign life insurance companies pay a tax on their gross premiums received from business conducted in Alabama at a rate of three percent, and foreign companies selling other types of insurance pay at a rate of four percent. Ala. Code § 27–4–4(a) (1975). All domestic insurance companies, in contrast, pay at a rate of only one percent on all types of insurance premiums. § 27–4–5(a).[3] As a result, a foreign

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Domestic Insurance Companies, Inc., et al. by *Robert W. Perkins* and *Samuel R. Neel III*.

[1] The origins of Alabama's domestic preference tax statute date back to 1849, when the first tax on premiums earned by insurance companies doing business in the State was limited to companies not chartered by the State. Act No. 1, 1849 Ala. Acts 5. A domestic preference tax was imposed on and off throughout the years until 1945, when the State restored equality in taxation of insurance companies in response to this Court's decision in *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533 (1944). Act No. 156, 1945 Ala. Acts 196–197. In 1955, the tax was reinstated, Act No. 77, 1955 Ala. Acts 193 (2d Spec. Sess.), and with minor amendments, has remained in effect until the present.

[2] For domestic preference tax purposes, Alabama defines a domestic insurer as a company that both is incorporated in Alabama and has its principal office and chief place of business within the State. Ala. Code § 27–4–1(3) (1975). A corporation that does not meet both of these criteria is characterized as a foreign insurer. § 27–4–1(2).

[3] There are two exceptions to these general rules concerning the rates of taxation of insurance companies. For annuities, the tax rate is one percent for both foreign and domestic insurers, Ala. Code § 27–4–4(a)

insurance company doing the same type and volume of business in Alabama as a domestic company generally will pay three to four times as much in gross premiums taxes as its domestic competitor.

Alabama's domestic preference tax statute does provide that foreign companies may reduce the differential in gross premiums taxes by investing prescribed percentages of their worldwide assets in specified Alabama assets and securities. § 27–4–4(b). By investing 10 percent or more of its total assets in Alabama investments, for example, a foreign life insurer may reduce its gross premiums tax rate from 3 to 2 percent. Similarly, a foreign property and casualty insurer may reduce its tax rate from four to three percent. Smaller tax reductions are available based on investment of smaller percentages of a company's assets. *Ibid.* Regardless of how much of its total assets a foreign company places in Alabama investments, it can never reduce its gross premiums tax rate to the same level paid by comparable domestic companies. These are entitled to the one-percent tax rate even if they have no investments in the State. Thus, the investment provision permits foreign insurance companies to reduce, but never to eliminate, the discrimination inherent in the domestic preference tax statute.

II

Appellants, a group of insurance companies incorporated outside of the State of Alabama, filed claims with the Alabama Department of Insurance in 1981, contending that the domestic preference tax statute, as applied to them, violated the Equal Protection Clause. They sought refunds of taxes paid for the tax years 1977 through 1980. The Commissioner of Insurance denied all of their claims on July 8, 1981.

(1975), and for wet marine and transportation insurance, the rate is three-quarters of one percent for both foreign and domestic insurance companies, § 27–4–6(a).

Appellants appealed to the Circuit Court for Montgomery County, seeking a judgment declaring the statute to be unconstitutional and requiring the Commissioner to make the appropriate refunds. Several domestic companies intervened, and the court consolidated all of the appeals, selecting two claims as lead cases[4] to be tried and binding on all claimants. On cross-motions for summary judgment, the court ruled on May 17, 1982, that the statute was constitutional. Relying on this Court's opinion in *Western & Southern Life Ins. Co.* v. *State Board of Equalization of California*, 451 U. S. 648 (1981), the court ruled that the Alabama statute did not violate the Equal Protection Clause because it served "at least two purposes, in addition to raising revenue: (1) encouraging the formation of new insurance companies in Alabama, and (2) encouraging capital investment by foreign insurance companies in the Alabama assets and governmental securities set forth in the statute." App. to Juris. Statement 20a–21a. The court also found that the distinction the statute created between foreign and domestic companies was rationally related to those two purposes and that the Alabama Legislature reasonably could have believed that the classification would have promoted those purposes. *Id.*, at 21a.

After their motion for a new trial was denied, appellants appealed to the Court of Civil Appeals. It affirmed the Circuit Court's rulings as to the existence of the two legitimate state purposes, but remanded for an evidentiary hearing on the issue of rational relationship, concluding that summary judgment was inappropriate on that question because the evidence was in conflict. 437 So. 2d 535 (1983). Appellants petitioned the Supreme Court of Alabama for certiorari on the affirmance of the legitimate state purpose issue, and the State and the intervenors petitioned for review of the remand order. Appellants then waived their right to an evidentiary hearing on the issue whether the statute's classification bore a rational relationship to the two purposes found by the Circuit Court to be legitimate, and they requested a final determination of the legal issues with respect to their equal protection challenge to the statute. The Supreme Court denied certiorari on all claims. Appellants again waived their rights to an evidentiary hearing on the rational relationship issue and filed a joint motion with the other parties seeking rehearing and entry of a final judgment. The motion was granted, and judgment was entered for the State and the intervenors. 447 So. 2d 142 (1983). This appeal followed, and we noted probable jurisdiction. 466 U. S. 935 (1984). We now reverse.

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[4] Metropolitan Life Insurance Co., a New York corporation, was chosen to represent the life insurance claimants, and Prudential Property and Casualty Co., a New Jersey corporation, was chosen as representative of the nonlife claimants. See App. 314–315.

III

Prior to our decision in *Western & Southern Life Ins. Co.* v. *State Board of Equalization of California*, *supra*, the jurisprudence of the applicability of the Equal Protection Clause to discriminatory tax statutes had a somewhat checkered history. *Lincoln National Life Ins. Co.* v. *Read*, 325 U. S. 673 (1945), held that so-called "privilege" taxes, required to be paid by a foreign corporation before it would be permitted to do business within a State, were immune from equal protection challenge. That case stood in stark contrast, however, to the Court's prior decisions in *Southern R. Co.* v. *Greene*, 216 U. S. 400 (1910), and *Hanover Fire Ins. Co.* v. *Harding*, 272 U. S. 494 (1926), as well as to later decisions, in which the Court had recognized that the Equal Protection Clause placed limits on other forms of discriminatory taxation imposed on out-of-state corporations solely because of their residence. See, *e. g.*, *WHYY, Inc.* v. *Glassboro*, 393 U. S. 117 (1968); *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U. S. 522 (1959); *Wheeling Steel Corp.* v. *Glander*, 337 U. S. 562 (1949).

In *Western & Southern*, *supra*, we reviewed all of these cases for the purpose of deciding whether to permit an equal protection challenge to a California statute imposing a retaliatory tax on foreign insurance companies doing business within the State, when the home States of those companies imposed a similar tax on California insurers entering their borders. We concluded that *Lincoln* was no more than "a surprising throwback" to the days before enactment of the Fourteenth Amendment and in which incorporation of a domestic corporation or entry of a foreign one had been granted only as a matter of privilege by the State in its unfettered discretion. 451 U. S., at 665. We therefore rejected the longstanding but "anachronis[tic]" rule of *Lincoln* and explicitly held that the Equal Protection Clause imposes limits upon a State's power to condition the right of a foreign corporation to do business within its borders. 451 U. S., at 667. We held that "[w]e consider it now established that, whatever the extent of a State's authority to exclude foreign corporations from doing business within its boundaries, that authority does not justify imposition of more onerous taxes or other burdens on foreign corporations than those imposed on domestic corporations, unless the discrimination between foreign and domestic corporations bears a rational relation to a legitimate state purpose." *Id.*, at 667–668.

Because appellants waived their right to an evidentiary hearing on the issue whether the classification in the Alabama domestic preference tax statute bears a rational relation to the two purposes upheld by the Circuit Court, the only question before us is whether those purposes are legitimate.[5]

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[5] The State and the intervenors advanced some 15 additional purposes in support of the Alabama statute. As neither the Circuit Court nor the Court of Civil Appeals ruled on the legitimacy of those purposes, that question is not before us, and we express no view as to it. On remand, the State will be free to advance again its arguments relating to the legitimacy of those purposes.

As the dissent finds our failure to resolve whether Alabama may continue to collect its tax "baffling," *post*, at 887, we reemphasize the procedural posture of the case: it arose on a motion for summary judgment. The

A

(1)

The first of the purposes found by the trial court to be a legitimate reason for the statute's classification between foreign and domestic corporations is that it encourages the formation of new domestic insurance companies in Alabama. The State, agreeing with the Court of Civil Appeals, contends that this Court has long held that the promotion of domestic industry, in and of itself, is a legitimate state purpose that will survive equal protection scrutiny. In so contending, it relies on a series of cases, including *Western & Southern*, that are said to have upheld discriminatory taxes. See *Bacchus Imports, Ltd.* v. *Dias*, 468 U. S. 263 (1984); *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137 (1970); *Allied Stores of Ohio, Inc.* v. *Bowers, supra; Parker* v. *Brown*, 317 U. S. 341 (1943); *Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495 (1937); *Board of Education* v. *Illinois*, 203 U. S. 553 (1906).

The cases cited lend little or no support to the State's contention. In *Western & Southern*, the case principally relied upon, we did not hold as a general rule that promotion of domestic industry is a legitimate state purpose under equal protection analysis.[6] Rather, we held that California's pur-

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Court of Civil Appeals upheld the Circuit Court's ruling that the two purposes identified by it were legitimate, but the appellate court remanded on the issue of rational relationship as to those purposes because it found the evidence in conflict. In order to obtain an expedited ruling, appellants waived their right to an evidentiary hearing only as to the purposes "which the lower courts have determined to be legitimate." 447 So. 2d 142, 143 (Ala. 1983). Thus, for this Court to resolve whether Alabama may continue to collect the tax, it would have to decide *de novo* whether any of the other purposes was legitimate, and also whether the statute's classification bore a rational relationship to any of these purposes—all this, on a record that the Court of Civil Appeals deemed inadequate.

[6] We find the other cases on which the State relies also to be inapposite to this inquiry. *Bacchus Imports*, *Pike*, and *Parker* discussed whether

pose in enacting the retaliatory tax—to promote the *interstate* business of domestic insurers by deterring *other States* from enacting discriminatory or excessive taxes—was a legitimate one. 451 U. S., at 668. In contrast, Alabama asks us to approve its purpose of promoting the business of its domestic insurers *in Alabama* by penalizing foreign insurers who also want to do business in the State. Alabama has made no attempt, as California did, to influence the policies of

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promotion of local industry is a valid state purpose under the Commerce Clause. The Commerce Clause, unlike the Equal Protection Clause, is integrally concerned with whether a state purpose implicates local or national interests. The Equal Protection Clause, in contrast, is concerned with whether a state purpose is impermissibly discriminatory; whether the discrimination involves local or other interests is not central to the inquiry to be made. Thus, the fact that promotion of local industry is a legitimate state interest in the Commerce Clause context says nothing about its validity under equal protection analysis. See *infra*, at 880–881.

Moreover, neither *Bacchus* nor *Pike* ruled that a State's ability to promote domestic industry was unlimited, even under the Commerce Clause. Thus, in *Bacchus*, although we observed as a general matter that "a State may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry," 468 U. S., at 271, we held that in so doing, a State may not constitutionally impose a discriminatory burden upon the business of other States, merely to protect and promote local business, *id.*, at 272–273. Accord, *Armco Inc.* v. *Hardesty*, 467 U. S. 638, 642 (1984). Likewise, in *Pike*, the Court held that the state statute promoting a legitimate local interest must "regulat[e] evenhandedly." 397 U. S., at 142.

Other cases cited by the State are simply irrelevant to the legitimacy of promoting local business at all. *Carmichael* relates primarily to the validity of a state unemployment compensation scheme, and *Board of Education* deals with the State's ability to regulate matters relating to probate. *Bowers* is the only one of the State's cases that involves the validity under the Equal Protection Clause of a tax that discriminates on the basis of residence of domestic *versus* foreign corporations. That case does little, however, to support the State's contention that promotion of domestic business is a legitimate state purpose. It was concerned with encouraging nonresidents—who are not competitors of residents—to build warehouses within the State. See *infra*, at 879–880.

other States in order to enhance its domestic companies' ability to operate interstate; rather, it has erected barriers to foreign companies who wish to do interstate business in order to improve its domestic insurers' ability to compete at home.

The crucial distinction between the two cases lies in the fact that Alabama's aim to promote domestic industry is purely and completely discriminatory, designed only to favor domestic industry within the State, no matter what the cost to foreign corporations also seeking to do business there. Alabama's purpose, contrary to California's, constitutes the very sort of parochial discrimination that the Equal Protection Clause was intended to prevent. As JUSTICE BRENNAN, joined by Justice Harlan, observed in his concurrence in *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U. S. 522 (1959), this Court always has held that the Equal Protection Clause forbids a State to discriminate in favor of its own residents solely by burdening "the residents of other state members of our federation." *Id.*, at 533. Unlike the retaliatory tax involved in *Western & Southern*, which only burdens residents of a State that imposes its own discriminatory tax on outsiders, the domestic preference tax gives the "home team" an advantage by burdening *all* foreign corporations seeking to do business within the State, no matter what they or their States do.

The validity of the view that a State may not constitutionally favor its own residents by taxing foreign corporations at a higher rate solely because of their residence is confirmed by a long line of this Court's cases so holding. *WHYY, Inc.* v. *Glassboro*, 393 U. S., at 119–120; *Wheeling Steel Corp.* v. *Glander*, 337 U. S., at 571; *Hanover Fire Ins. Co.* v. *Harding*, 272 U. S., at 511; *Southern R. Co.* v. *Greene*, 216 U. S., at 417. See *Reserve Life Ins. Co.* v. *Bowers*, 380 U. S. 258 (1965) *(per curiam)*. As the Court stated in *Hanover Fire Ins. Co.*, with respect to general tax burdens on business, "the foreign corporation stands equal, and is to be classified with domestic corporations of the same kind."

272 U. S., at 511. In all of these cases, the discriminatory tax was imposed by the State on foreign corporations doing business within the State solely because of their residence, presumably to promote domestic industry within the State.[7] In relying on these cases and rejecting *Lincoln* in *Western & Southern*, we reaffirmed the continuing viability of the Equal Protection Clause as a means of challenging a statute that seeks to benefit domestic industry within the State only by grossly discriminating against foreign competitors.

The State contends that *Allied Stores of Ohio, Inc.* v. *Bowers*, *supra*, shows that this principle has not always held true. In that case, a domestic merchandiser challenged on equal protection grounds an Ohio statute that exempted foreign corporations from a tax on the value of merchandise held for storage within the State. The Court upheld the tax, finding that the purpose of encouraging foreign companies to build warehouses within Ohio was a legitimate state purpose. The State contends that this case shows that promotion of domestic business *is* a legitimate state purpose under equal protection analysis.

We disagree with the State's interpretation of *Allied Stores* and find that the case is not inconsistent with the other cases on which we rely. We agree with the holding of *Allied Stores* that a State's goal of bringing in new business is legitimate and often admirable. *Allied Stores* does not, however, hold that promotion of domestic business by *discriminating* against foreign corporations is legitimate. The case involves instead a statute that *encourages nonresidents*—who are not competitors of residents—to build warehouses within the State. The discriminatory tax involved did not favor residents by burdening outsiders; rather, it granted the nonresident businesses an exemption that residents did not share. Since the foreign and domestic companies involved were not competing to provide warehousing services, granting the former an exemption did not even directly affect adversely the domestic companies subject to the tax. On its facts, then, *Allied Stores* is not inconsistent with our holding here that promotion of domestic business within a State, by discriminating against foreign corporations that wish to compete by doing business there, is not a legitimate state purpose. See 358 U. S., at 532–533 (BRENNAN, J., concurring).

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[7] Although the promotion of domestic business was not a purpose advanced by the States in support of their taxes in these cases, such promotion is logically the primary reason for enacting discriminatory taxes such as those at issue there.

(2)

The State argues nonetheless that it is impermissible to view a discriminatory tax such as the one at issue here as violative of the Equal Protection Clause. This approach, it contends, amounts to no more than "Commerce Clause rhetoric in equal protection clothing." Brief for Appellee Ward 22. The State maintains that because Congress, in enacting the McCarran-Ferguson Act, 15 U. S. C. §§ 1011–1015, intended to authorize States to impose taxes that burden interstate commerce in the insurance field, the tax at issue here must stand. Our concerns are much more fundamental than as characterized by the State. Although the McCarran-Ferguson Act exempts the insurance industry from Commerce Clause restrictions, it does not purport to limit in any way the applicability of the Equal Protection Clause. As noted above, our opinion in *Western & Southern* expressly reaffirmed the viability of equal protection restraints on discriminatory taxes in the insurance context.[8]

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[8] In fact, as we noted in *Western & Southern*, the legislative history of the McCarran-Ferguson Act reveals that the Act was Congress' response only to *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533 (1944), and that Congress did not intend thereby to give the States any power to tax or regulate the insurance industry other than what they had previously possessed. Thus Congress expressly left undisturbed this Court's decisions holding that the Equal Protection Clause places

Moreover, the State's view ignores the differences between Commerce Clause and equal protection analysis and the consequent different purposes those two constitutional provisions serve. Under Commerce Clause analysis, the State's interest, if legitimate, is weighed against the burden the state law would impose on interstate commerce. In the equal protection context, however, if the State's purpose is found to be legitimate, the state law stands as long as the burden it imposes is found to be rationally related to that purpose, a relationship that is not difficult to establish. See *Western & Southern,* 451 U. S., at 674 (if purpose is legitimate, equal protection challenge may not prevail so long as the question of rational relationship is "'at least debatable'" (quoting *United States* v. *Carolene Products Co.*, 304 U. S. 144, 154 (1938)).

The two constitutional provisions perform different functions in the analysis of the permissible scope of a State's power—one protects interstate commerce, and the other protects persons[9] from unconstitutional discrimination by the States. See *Bethlehem Motors Corp.* v. *Flynt,* 256 U. S. 421, 423–424 (1921). The effect of the statute at issue here is to place a discriminatory tax burden on foreign insurers who desire to do business within the State, thereby also incidentally placing a burden on interstate commerce. Equal protection restraints are applicable even though the *effect* of the discrimination in this case is similar to the type of burden with which the Commerce Clause also would be concerned. We reaffirmed the importance of the Equal Protection Clause in the insurance context in *Western & Southern* and see no reason now for reassessing that view.

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limits on a State's ability to tax out-of-state corporations. See 451 U. S., at 655, n. 6.

[9] It is well established that a corporation is a "person" within the meaning of the Fourteenth Amendment. *E. g., Western & Southern,* 451 U. S., at 660, n. 12.

In whatever light the State's position is cast, acceptance of its contention that promotion of domestic industry is always a legitimate state purpose under equal protection analysis would eviscerate the Equal Protection Clause in this context. A State's natural inclination frequently would be to prefer domestic business over foreign. If we accept the State's view here, then any discriminatory tax would be valid if the State could show it reasonably was intended to benefit domestic business.[10] A discriminatory tax would stand or fall depending primarily on how a State framed its purpose—as benefiting one group or as harming another. This is a distinction without a difference, and one that we rejected last Term in an analogous context arising under the Commerce Clause. *Bacchus Imports, Ltd.* v. *Dias*, 468 U. S., at 273. See n. 6, *supra*. We hold that under the circumstances of this case, promotion of domestic business by discriminating against nonresident competitors is not a legitimate state purpose.

B

The second purpose found by the courts below to be legitimate was the encouragement of capital investment in the Alabama assets and governmental securities specified in the statute. We do not agree that this is a legitimate state purpose when furthered by discrimination. Domestic insurers remain entitled to the more favorable rate of tax regardless of whether they invest in Alabama assets. Moreover, the investment incentive provision of the Alabama statute does not enable foreign insurance companies to eliminate the discriminatory effect of the statute. No matter how much of their assets they invest in Alabama, foreign insurance companies are still required to pay a higher gross premiums tax than domestic companies. The State's investment incentive provision therefore does not cure, but reaffirms, the statute's impermissible classification based solely on residence. We hold that encouraging investment in Alabama assets and securities in this plainly discriminatory manner serves no legitimate state purpose.

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[10] Indeed, under the State's analysis, *any* discrimination subject to the rational relation level of scrutiny could be justified simply on the ground that it favored one group at the expense of another. This case does not involve or question, as the dissent suggests, *post*, at 900–901, the broad authority of a State to promote and regulate its own economy. We hold only that such regulation may not be accomplished by imposing discriminatorily higher taxes on nonresident corporations solely because they are nonresidents.

IV

We conclude that neither of the two purposes furthered by the Alabama domestic preference tax statute and addressed by the Circuit Court for Montgomery County, see *supra*, at 873, is legitimate under the Equal Protection Clause to justify the imposition of the discriminatory tax at issue here. The judgment of the Alabama Supreme Court accordingly is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE O'CONNOR, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE REHNQUIST join, dissenting.

This case presents a simple question: Is it legitimate for a State to use its taxing power to promote a domestic insurance industry and to encourage capital investment within its borders? In a holding that can only be characterized as astonishing, the Court determines that these purposes are illegitimate. This holding is unsupported by precedent and subtly distorts the constitutional balance, threatening the freedom of both state and federal legislative bodies to fashion appropriate classifications in economic legislation. Because I disagree with both the Court's method of analysis and its conclusion, I respectfully dissent.

I

Alabama's legislature has chosen to impose a higher tax on out-of-state insurance companies and insurance companies incorporated in Alabama that do not maintain their principal place of business or invest assets within the State. Ala. Code § 27–4–4 *et seq.* (1975). This tax seeks to promote both a domestic insurance industry and capital investment in Alabama. App. to Juris. Statement 20a–21a. Metropolitan Life Insurance Company, joined by many other out-of-state insurers, alleges that this discrimination violates its rights under the Equal Protection Clause of the Fourteenth Amendment, which provides that a State shall not "deny to any person within its jurisdiction the equal protection of the laws." Appellants rely on the Equal Protection Clause because, as corporations, they are not "citizens" protected by the Privileges and Immunities Clauses of the Constitution. *Hemphill* v. *Orloff*, 277 U. S. 537, 548–550 (1928). Similarly, they cannot claim Commerce Clause protection because Congress in the McCarran-Ferguson Act, 59 Stat. 33, as amended, 15 U. S. C. § 1011 *et seq.*, explicitly suspended Commerce Clause restraints on state taxation of insurance and placed insurance regulation firmly within the purview of the several States. *Western & Southern Life Ins. Co.* v. *State Board of Equalization of California*, 451 U. S. 648, 655 (1981).

Our precedents impose a heavy burden on those who challenge local economic regulation solely on Equal Protection Clause grounds. In this context, our long-established jurisprudence requires us to defer to a legislature's judgment if the classification is rationally related to a legitimate state purpose. Yet the Court evades this careful framework for analysis, melding the proper two-step inquiry regarding the State's purpose and the classification's relationship to that purpose into a single unarticulated judgment. This tactic enables the Court to characterize state goals that have been legitimated by Congress itself as improper solely because it disagrees with the concededly rational means of differential taxation selected by the legislature. This unorthodox approach leads to further error. The Court gives only the most cursory attention to the factual and legal bases supporting the State's purposes and ignores both precedent and significant evidence in the record establishing their legitimacy. Most troubling, the Court discovers in the Equal Protection Clause an implied prohibition against classifications whose purpose is to give the "home team" an advantage over interstate competitors even where Congress has authorized such advantages. *Ante*, at 878.

The Court overlooks the unequivocal language of our prior decisions. "Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest." *New Orleans* v. *Dukes*, 427 U. S. 297, 303 (1976). See, *e. g.*, *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U. S. 356 (1973). Judicial deference is strongest where a tax classification is alleged to infringe the right to equal protection. "[I]n taxation, even more than in other fields, legislatures possess the greatest freedom in classification." *Madden* v. *Kentucky*, 309 U. S. 83, 88 (1940). "Where the public interest is served one business may be left untaxed and another taxed, in order to promote the one or to restrict or suppress the other." *Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495, 512 (1937) (citations omitted). As the Court emphatically noted in *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U. S. 522, 528 (1959) (citations omitted):

> "[I]t has repeatedly been held and appears to be entirely settled that a statute which encourages the location within the State of needed and useful industries by exempting them, though not also others, from its taxes is not arbitrary and does not violate the Equal Protection Clause of the Fourteenth Amendment. Similarly, it has long been settled that a classification, though discriminatory, is not arbitrary or violative of the Equal Protection Clause of the Fourteenth Amendment if any

> state of facts reasonably can be conceived that would sustain it."

See also *Western & Southern Life Ins. Co.* v. *State Board of Equalization of California, supra,* at 674; *Minnesota* v. *Clover Leaf Creamery Co.,* 449 U. S. 456, 464 (1981).

Appellants waived their right to an evidentiary hearing and conceded that Alabama's classification was rationally related to its purposes of encouraging the formation of domestic insurance companies and bringing needed services and capital to the State. Thus the only issue in dispute is the legitimacy of these purposes. Yet it is obviously legitimate for a State to seek to promote local business and attract capital investment, and surely those purposes animate a wide range of legislation in all 50 States.

The majority evades the obvious by refusing to acknowledge the factual background bearing on the legitimacy of the State's purpose or to address the many collateral public benefits advanced by Alabama. Instead, the Court dismisses appellees' arguments by merely stating that they were not ruled on by the courts below. *Ante,* at 875–876, n. 5. In point of fact, the full range of purposes documented before this Court was also argued and documented before the Alabama Circuit Court. See Record, Vols. 6–8. That court found "*at least* two purposes, in addition to raising revenue: (1) encouraging the formation of new insurance companies in Alabama, and (2) encouraging capital investment by foreign insurance companies in the Alabama assets and governmental securities set forth in the statute." App. to Juris. Statement 20a–21a (emphasis added). As appellants concede, these purposes are simply a step in achieving the "larger set of purposes [whose] premise . . . is that domestic insurance companies, on the whole, benefit the state in ways which foreign companies do not." Brief for Appellants 31.

In any event, it is settled law that the appellee may assert any argument in support of the judgment in his favor, regardless of whether it was relied upon by the court below.

Dandridge v. *Williams,* 397 U. S. 471, 475, n. 6 (1970). The Court's failure actually to resolve whether Alabama may continue to collect its tax, see *ante,* at 882, n. 10, is all the more baffling, since appellants took the exceptional step of conceding the factual issues to assure a speedy resolution of numerous pending lawsuits disruptive of industry stability. See Brief for State of Alaska et al. as *Amici Curiae* 1–2. Our precedents do not condone such a miserly approach to review of statutes adjusting economic burdens. See, *e. g., Allied Stores of Ohio, Inc.* v. *Bowers, supra,* at 528–529; *McGowan* v. *Maryland,* 366 U. S. 420, 425 (1961); *United States* v. *Carolene Products Co.,* 304 U. S. 144, 152–153 (1938); *Borden's Farm Products Co.* v. *Baldwin,* 293 U. S. 194, 209 (1934). The Court has consistently reviewed the validity of such statutes based on whatever "may reasonably have been the purpose and policy of the State Legislature, in adopting the proviso." *Allied Stores of Ohio, Inc.* v. *Bowers, supra,* at 528–529. It is to that inquiry that I now turn.

Appellees claim that Alabama's insurance tax, in addition to raising revenue and promoting investment, promotes the formation of new domestic insurance companies and enables them to compete with the many large multistate insurers that currently occupy some 75% to 85% of the Alabama insurance market. App. 80. Economic studies submitted by the State document differences between the two classes of insurers that are directly relevant to the well-being of Alabama's citizens. See *id.,* at 46–129. Foreign insurers typically concentrate on affluent, high volume, urban markets and offer standardized national policies. In contrast, domestic insurers such as intervenors American Educators Life Insurance Company and Booker T. Washington Life Insurance Company are more likely to serve Alabama's rural areas, and to write low-cost industrial and burial policies not offered by the larger national companies.[1] Additionally, appellees argue persuasively that Alabama can more readily regulate domestic insurers and more effectively safeguard their solvency than that of insurers domiciled and having their principal places of business in other States.

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[1] "Industrial insurance" is the trade term for a low face-value policy typically sold door-to-door and maintained through home collection of monthly

Ignoring these policy considerations, the Court insists that Alabama seeks only to benefit local business, a purpose the Court labels invidious. Yet if the classification chosen by the State can be shown *actually* to promote the public welfare, this is strong evidence of a legitimate state purpose. See Note, Taxing Out-of-State Corporations After *Western & Southern:* An Equal Protection Analysis, 34 Stan. L. Rev. 877, 896 (1982). In this regard, Justice Frankfurter wisely observed:

> "[T]he great divide in the [equal protection] decisions lies in the difference between emphasizing the actualities or the abstractions of legislation.
>
> ". . . To recognize marked differences that exist in fact is living law; to disregard practical differences and concentrate on some abstract identities is lifeless logic." *Morey* v. *Doud*, 354 U. S. 457, 472 (1957) (dissenting).

A thoughtful look at the "actualities of [this] legislation" compels the conclusion that the State's goals are legitimate by any test.

II

The policy of favoring local concerns in state regulation and taxation of insurance, which the majority condemns as illegitimate, is not merely a recent invention of the States. The States initiated regulation of the business of insurance as early as 1851. See Report of the Comptroller General,

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or weekly premiums. Alabama currently has more industrial insurance in force than any other State. Burial insurance is another form of insurance popular in rural Alabama that is offered exclusively by local insurers. By contrast, Metropolitan Life, like many multistate insurers, has discontinued writing even whole-life policies with face values below $15,000. App. 173–176.

Issues and Needed Improvements in State Regulation of the Insurance Business, GAO Report B–192813, p. 5 (Oct. 9, 1979) (GAO Report). In 1944, however, this Court overruled a long line of cases holding that the business of insurance was an intrastate activity beyond the scope of the Commerce Clause. *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533. "The decision provoked widespread concern that the States would no longer be able to engage in taxation and effective regulation of the insurance industry. Congress moved quickly, enacting the McCarran-Ferguson Act within a year of the decision in *South-Eastern Underwriters*." *St. Paul Fire & Marine Insurance Co.* v. *Barry*, 438 U. S. 531, 539 (1978). See H. R. Rep. No. 143, 79th Cong., 1st Sess., 2 (1945); 91 Cong. Rec. 479–480 (1945) (remarks of Sen. Ferguson); *id.*, at 487 (remarks of Sen. Ellender).

The drafters of the Act were sensitive to the same concerns Alabama now vainly seeks to bring to this Court's attention: the greater responsiveness of local insurance companies to local conditions, the different insurance needs of rural and industrial States, the special advantages and constraints of state-by-state regulation, and the importance of insurance license fees and taxes as a major source of state revenues. See, *e. g.*, Hearings on S. 1362 before the Senate Subcommittee on the Judiciary, 78th Cong., 1st Sess., 3, 10, 16–17 (1943) (letter of Gov. Sharpe of South Dakota stressing role of domestic insurers that provide "poor man" and rural policies adapted to farming concerns); 90 Cong. Rec. 6564 (1944) (remarks of Rep. Vorhis). "As this Court observed shortly afterward, '[o]bviously Congress' purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance.' *Prudential Insurance Co.* v. *Benjamin*, 328 U. S. 408, 429 (1946)." *St. Paul Fire & Marine Insurance Co.* v. *Barry*, *supra*, at 539.

The majority opinion correctly notes that Congress did not intend the McCarran-Ferguson Act to give the States any power to tax or regulate the insurance industry other than they already possessed. But the legislative history cited by the majority, *ante*, at 879, n. 7, relates not to differential taxation but to decisions of this Court that had invalidated state taxes on contracts of insurance entered into outside the State's jurisdiction. See H. R. Rep. No. 143, 79th Cong., 1st Sess., 3 (1945). The Court fails to mention that at the time the Act was under consideration the taxing schemes of Alabama, Arizona, Arkansas, Illinois, Kansas, Kentucky, Maine, Michigan, Mississippi, Ohio, Oklahoma, Oregon, South Dakota, Tennessee, Texas, Washington, and Wisconsin all incorporated tax differentials favoring domestic insurers. See App. 377–379.

Any doubt that Congress' intent encompassed taxes that discriminate in favor of local insurers was dispelled in *Prudential Insurance Co.* v. *Benjamin*, 328 U. S. 408 (1946). Cf. Note, Congressional Consent to Discriminatory State Legislation, 45 Colum. L. Rev. 927 (1945) (discussing the issues of constitutional power posed by the Act). There a foreign insurer challenged a tax on annual gross premiums imposed on foreign but not domestic insurers as a condition for renewal of its license to do business. Congress, the foreign insurer argued, was powerless to sanction the tax at issue because "the commerce clause 'by its own force' forbids discriminatory state taxation." 328 U. S., at 426. A unanimous Court rejected the argument that exacting a 3% gross premium tax from foreign insurers was invalid as "somehow technically of an inherently discriminatory character." *Id.*, at 432. The Court concluded that the McCarran-Ferguson Act's effect was "clearly to sustain the exaction and that this can be done without violating *any* constitutional provision." *Id.*, at 427 (emphasis added).

Benjamin expressly noted that nothing in the Equal Protection Clause forbade the State to enact a law such as the tax at issue. *Id.*, at 438, and n. 50. In this regard the Court relied in part on *Hanover Fire Ins. Co.* v. *Harding*, 272 U. S. 494 (1926), a decision that explicitly recognized that differential taxation of revenues of foreign corporations may not be arbitrary or without reasonable basis. See *Western & Southern Life Ins. Co.* v. *State Board of Equalization of California*, 451 U. S., at 664, n. 17. The Commerce Clause, *Benjamin* emphasized, is not a "one-way street" but encompasses congressional power "to discriminate against interstate commerce and in favor of local trade," "subject only to the restrictions placed upon its authority by other constitutional provisions." 328 U. S., at 434. Where the States and Congress have acted in concert to effect a policy favoring local concerns, their action must be upheld unless it unequivocally exceeds "some explicit and compelling limitation imposed by a constitutional provision or provisions designed and intended to outlaw the action taken entirely from our constitutional framework." *Id.*, at 435–436.

Our more recent decision in *Western & Southern* in no way undermines the force of the analysis in *Benjamin*. *Western & Southern* confirms that differential premium taxes are not immune from review as "privilege" taxes, but it also teaches that the Constitution requires only that discrimination between domestic and foreign corporations bear a rational relationship to a legitimate state purpose. *Benjamin* clearly recognized that differentially taxing foreign insurers to promote a local insurance industry was a legitimate state purpose completely consonant with Congress' purpose in the McCarran-Ferguson Act.

The contemporary realities of insurance regulation and taxation continue to justify a uniquely local perspective. Insurance regulation and taxation must serve local social policies including assuring the solvency and reliability of companies doing business in the State and providing special protection for those who might be denied insurance in a free market, such as the urban poor, small businesses, and family farms. GAO Report 10–13; State Insurance Regulation, Hearing before the Subcommittee on Antitrust, Monopoly and Business Rights of the Senate Committee on the Judiciary, 96th Cong., 1st Sess., 19–21 (1979) (hereinafter Insurance Regulation). Currently at least 28 of the 50 States employ a combination of investment incentives and differential premium taxes favoring domestic insurers to encourage local investment of policyholders' premiums and to partially shelter smaller domestic insurers from competition with the large multistate companies. App. 66.

State insurance commissions vary widely in manpower and expertise. GAO Report 14. In practice, the State of incorporation exercises primary oversight of the solvency of its insurers. *Id.*, at 36–38. See generally Dunne, Risk, Reality, and Reason in Financial Services Deregulation: A State Legislative Perspective, 2 J. Ins. Reg. 342 (1984) (prepared by the Conference of Insurance Legislators). See, *e. g.*, Ala. Code § 27–2–21 (Supp. 1984); Ill. Rev. Stat., ch. 73, ¶ 745 (1983) (power to examine books of domestic insurers); Ala. Code § 27–32–1 *et seq.* (1975); Ill. Rev. Stat., ch. 73, ¶¶ 799, 800 (1983) (commissioner's authority to assume control to prevent insolvency); see generally Wis. Stat. Ann., ch. 620, Prefatory Committee Comment—1971, pp. 536, 546 (1980) (noting lesser control over nondomestic's financial operations). Even the State of incorporation's efforts to regulate a multistate insurer may be seriously hampered by the difficulty of gaining access to records and assets in 49 other States. Dunne, *supra*, at 356. Thus the security of Alabama's citizens who purchase insurance from out-of-state companies may depend in part on the diligence of another State's insurance commissioner, over whom Alabama has no authority and limited influence. In the event of financial failure of a foreign insurer the State may have difficulty levying on out-of-state assets. See, *e. g.*, *South Carolina ex rel. Phoenix Life Ins. Co.* v. *McMaster*, 237 U. S. 63, 73 (1915). Since each State maintains its own insurance guarantee fund, the domestic insurers of the States where a multistate insurer is admitted to do business may ultimately be forced to absorb local policyholders' losses. Dunne, *supra*, at 372–373.

Many have sharply criticized this piecemeal system, see, *e. g.*, GAO Report i-iii; Schmalz, The Insurance Exemption: Can it be Modified Successfully?, 48 ABA Antitrust L. J. 579 (1979), but Congress has resisted suggestions that it modify the McCarran-Ferguson Act to permit greater federal intervention. See GAO Report 1; Insurance Regulation, *supra*. This Court cannot ignore the exigencies of contemporary insurance regulation outlined above simply because it might prefer uniform federal regulation. Given the distinctions in ease of regulation and services rendered by foreign and domestic insurers, we cannot dismiss as illegitimate the State's goal of promoting a healthy local insurance industry sensitive to regional differences and composed of companies that agree to subordinate themselves to the Alabama Commissioner's control and to maintain a principal place of business within Alabama's borders. Though economists might dispute the efficacy of Alabama's tax, "[p]arties challenging legislation under the Equal Protection Clause cannot prevail so long as 'it is evident from all the considerations presented to [the legislature], and those of which we may take judicial notice, that the question is at least debatable.'" *Western & Southern Life Ins. Co.* v. *State Board of Equalization of California*, 451 U. S., at 674, quoting *United States* v. *Carolene Products Co.*, 304 U. S., at 154. Moreover, appellants waived their right to challenge the tax measure's effectiveness.

III

Despite abundant evidence of a legitimate state purpose, the majority condemns Alabama's tax as "purely and completely discriminatory" and "the very sort of parochial discrimination that the Equal Protection Clause was intended to prevent." *Ante*, at 878. Apparently, the majority views any favoritism of domestic commercial entities as inherently suspect. The majority ignores a long line of our decisions. In the past this Court has not hesitated to apply the rational basis test to regulatory classifications that distinguish between domestic and out-of-state corporations or burden foreign interests to protect local concerns. The Court has always recognized that there are certain legitimate restrictions or policies in which, "[b]y definition, discrimination against nonresidents would inhere." *Arlington County Board* v. *Richards*, 434 U. S. 5, 7 (1977) *(per curiam)*. For example, where State of incorporation or principal place of business affect the State's ability to regulate or exercise its jurisdiction, a State may validly discriminate between foreign and domestic entities. See *G. D. Searle & Co.* v. *Cohn*, 455 U. S. 404 (1982) (difficulty of obtaining jurisdiction over nonresident corporation provides a rational basis for excepting such corporations from statute of limitations); *Metropolitan Casualty Ins. Co.* v. *Brownell*, 294 U. S. 580 (1935) (domicile of insurer relevant to statute of limitations as foreign insurers' offices and funds generally located outside State); *Board of Education* v. *Illinois*, 203 U. S. 553, 562 (1906) (State's greater control over domestic than foreign nonprofit corporations justifies discriminatory tax).

A State may use its taxing power to entice useful foreign industry, see *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U. S., at 528, or to make residence within its boundaries more attractive, see *Zobel* v. *Williams*, 457 U. S. 55 , 67–68 (1982) (BRENNAN, J., concurring). Though such measures might run afoul of the Commerce Clause, "[n]o one disputes that a State may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry." *Bacchus Imports, Ltd.* v. *Dias*, 468 U. S. 263, 271 (1984); *Western & Southern Life Ins. Co.* v. *State Board of Equalization of California*, *supra*, at 668. Cf. *Edgar* v. *MITE Corp.*, 457 U. S. 624, 646 (1982) (POWELL, J., concurring in part) (noting State's interest in protecting regionally based corporations from acquisition by foreign corporations).

Moreover, the Court has held in the dormant Commerce Clause context that a State may provide subsidies or rebates to domestic but not to foreign enterprises if it rationally believes that the former contribute to the State's welfare in ways that the latter do not. *Hughes* v. *Alexandria Scrap Corp.,* 426 U. S. 794 (1976). Although the Court has divided on the circumstances in which the dormant Commerce Clause allows such measures, see *id.*, at 817 (BRENNAN, J., dissenting), surely there can be no dispute that they are constitutionally permitted where Congress itself has affirmatively authorized the States to promote local business concerns free of Commerce Clause constraints. Neither the Commerce Clause nor the Equal Protection Clause bars Congress from enacting or authorizing the States to enact legislation to protect industry in one State "from disadvantageous competition" with less stringently regulated businesses in other States. *Hodel* v. *Indiana,* 452 U. S. 314, 329 (1981). See also *Western & Southern, supra,* at 669 (with congressional approval, States may promote domestic insurers by seeking to deter other States from enacting discriminatory or excessive taxes).

The majority's attempts to distinguish these precedents are unconvincing. First the majority suggests that a state purpose might be legitimate for purposes of the Commerce Clause but somehow illegitimate for purposes of the Equal Protection Clause. No basis is advanced for this theory because no basis exists. The test of a legitimate state purpose must be whether it addresses valid state concerns. To suggest that the purpose's legitimacy, chameleon-like, changes according to the constitutional clause cited in the complaint is merely another pretext to escape the clear message of this Court's precedents.

Next the majority asserts that "a State may not constitutionally favor its own residents by taxing foreign corporations at a higher rate solely because of their residence," citing cases that rejected discriminatory ad valorem property taxes, defended as taxes on the "privilege" of doing business. *Ante*, at 878–879. See, *e. g.*, *WHYY, Inc.* v. *Glassboro*, 393 U. S. 117 (1968); *Wheeling Steel Corp.* v. *Glander*, 337 U. S. 562 (1949); *Hanover Fire Ins. Co.* v. *Harding*, 272 U. S. 494 (1926); *Southern R. Co.* v. *Greene*, 216 U. S. 400 (1910). These decisions were addressed in *Western & Southern*, and the classifications were characterized as impermissibly discriminatory because they did not "'rest on differences pertinent to the subject in respect of which the classification is made.'" 451 U. S., at 668, quoting *Power Manufacturing Co.* v. *Saunders*, 274 U. S. 490, 494 (1927). As the majority concedes, none of these decisions intimates that the tax statutes at issue in the decisions rested on relevant differences between domestic and foreign corporations or had purposes other than the raising of revenue at the out-of-state corporations' expense.

In fact, the Court noted in several of these opinions that foreign corporations *may* validly be taxed at a higher rate if the classification is based on some relevant distinction. No such distinction, however, had been demonstrated or even alleged. See *WHYY, Inc.* v. *Glassboro*, *supra*, at 120 ("This is not a case in which the exemption was withheld by reason of the foreign corporation's failure or inability to benefit the State in the same measure as do domestic nonprofit corporations"); *Wheeling Steel Corp.* v. *Glander*, *supra*, at 572 ("[T]he inequality is not because of the slightest difference in Ohio's relation to the decisive transaction"); *Southern R. Co.* v. *Greene*, *supra*, at 416–417 (parties conceded that the business of the foreign and domestic corporations was precisely the same).[2] Lacking the threshold requirement of an articulated distinction relevant to an asserted purpose, the classifications at issue in these decisions could never have survived rational basis scrutiny and no such analysis was even attempted. These precedents do not answer the question posed by this case: whether a legislature may adopt differential tax treatment of domestic and foreign insurers not simply to raise additional revenue but with the purpose of affecting the market as an "instrument of economic and social engineering." P. Hartman, Federal Limitations on State and Local Taxation § 3:2 (1981). The majority's suggestion that these cases necessarily decided the issue before us, as promotion of domestic business is "logically the primary reason for enacting discriminatory taxes such as those at issue [in the cited cases]," is mere speculation. See *ante*, at 879, n. 7.

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[2] The only cited authority that arguably addressed the issue raised in the instant case is a *per curiam* reversal and remand without opinion of a decision upholding a discriminatory ad valorem tax on a foreign insurer's fixtures and other tangible property. See *Reserve Life Ins. Co.* v. *Bowers*, 380 U. S. 258 (1965). A reversal and remand is more enigmatic even

In treating these cases as apposite authority, the majority again closes its eyes to the facts. Alabama does *not* tax at a higher rate solely on the basis of residence; it taxes insurers, domestic as well as foreign, who do not maintain a principal place of business or substantial assets in Alabama, based on conceded distinctions in the contributions of these insurers *as a class* to the State's insurance objectives. The majority obscures the issue by observing that a given "foreign insurance company doing the same type and volume of business in Alabama as a domestic company" will pay a higher tax. *Ante*, at 871–872. Under our precedents, tax classifications need merely "res[t] upon some reasonable consideration of difference or policy." *Allied Stores of Ohio, Inc.* v. *Bowers*,

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than a summary affirmance, which has precedential value only as to "the precise issues necessarily presented and necessarily decided." *Mandel* v. *Bradley*, 432 U. S. 173, 176 (1977). Decisions without opinion may not be equated with "an opinion by this Court treating the question on the merits." See *Edelman* v. *Jordan*, 415 U. S. 651, 670–671 (1974). "Indeed, upon fuller consideration of an issue under plenary review, the Court has not hesitated to discard a rule which a line of summary affirmances may appear to have established." *Fusari* v. *Steinberg*, 419 U. S. 379, 392 (1975) (BURGER, C. J., concurring).

358 U. S., at 527. Rational basis scrutiny does not require that the classification be mathematically precise or that *every* foreign insurer or *every* domestic company fit to perfection the general profile on which the classification is based. "[T]he Equal Protection Clause does not demand a surveyor's precision" in fashioning classifications. *Hughes* v. *Alexandria Scrap Corp.*, 426 U. S., at 814.

IV

Because Alabama's classification bears a rational relationship to a legitimate purpose, our precedents demand that it be sustained. The Court avoids this clear directive by a remarkable evasive tactic. It simply declares that the ends of promoting a domestic insurance industry and attracting investments to the State *when accomplished through the means of discriminatory taxation* are not legitimate state purposes. This bold assertion marks a drastic and unfortunate departure from established equal protection doctrine. By collapsing the two prongs of the rational basis test into one, the Court arrives at the ultimate issue—whether the *means* are constitutional—without ever engaging in the deferential inquiry we have adopted as a brake on judicial impeachment of legislative policy choices. In addition to unleashing an undisciplined form of Equal Protection Clause scrutiny, the Court's approach today has serious implications for the authority of Congress under the Commerce Clause. Groping for some basis for this radical departure from equal protection analysis, the Court draws heavily on JUSTICE BRENNAN's concurring opinion in *Allied Stores of Ohio, Inc.* v. *Bowers*, *supra*, at 530, as support for its argument that "the Equal Protection Clause forbids a State to discriminate in favor of its own residents solely by burdening 'the residents of other state members of our federation.'" *Ante*, at 878, quoting 358 U. S., at 533.

As noted in *Western & Southern*, JUSTICE BRENNAN's interpretation has not been adopted by the Court, "which has subsequently required no more than a rational basis for discrimination by States against out-of-state interests in the context of equal protection litigation." 451 U. S., at 667, n. 21. More importantly, to the extent the Court today purports to find in the Equal Protection Clause an instrument of federalism, it entirely misses the point of JUSTICE BRENNAN's analysis. JUSTICE BRENNAN reasoned that "[t]he Constitution furnishes the structure for the operation of the States with respect to the National Government and with respect to each other" and that "the Equal Protection Clause, among its other roles, operates to maintain this principle of federalism." 358 U. S., at 532. Favoring local business as an end in itself might be "rational" but would be antithetical to federalism. Accepting *arguendo* this interpretation, we have shown that the measure at issue here does not benefit local business as an end in itself but serves important ulterior goals. Moreover, any federalism component of equal protection is fully vindicated where Congress has explicitly validated a parochial focus. Surely the Equal Protection Clause was not intended to supplant the Commerce Clause, foiling Congress' decision under its commerce powers to "affirmatively permit [some measure of] parochial favoritism" when necessary to a healthy federation. *White* v. *Massachussetts Council of Construction Employers, Inc.*, 460 U. S. 204, 213 (1983). Such a view of the Equal Protection Clause cannot be reconciled with the McCarran-Ferguson Act and our decisions in *Western & Southern* and *Benjamin*.

Western & Southern established that a State may validly tax out-of-state corporations at a higher rate if its goal is to promote the ability of its domestic businesses to compete in *interstate* markets. Nevertheless, the Court today concludes that the converse policy is forbidden, striking down legislation whose purpose is to encourage the *intrastate* activities of local business concerns by permitting them to compete effectively on their home turf. In essence, the Court declares: "We will excuse an unequal burden on foreign insurers if the State's purpose is to foster its domestic insurers' activities in *other* States, but the same unequal burden will be unconstitutional when employed to further a policy that places a higher social value on the domestic insurer's *home State* than interstate activities." This conclusion is not drawn from the Commerce Clause, the textual source of constitutional restrictions on state interference with interstate competition. Reliance on the Commerce Clause would, of course, be unavailing here in view of the McCarran-Ferguson Act. Instead the Court engrafts its own economic values on the Equal Protection Clause. Beyond guarding against arbitrary or irrational discrimination, as interpreted by the Court today this Clause now prohibits the effectuation of economic policies, even where sanctioned by Congress, that elevate local concerns over interstate competition. *Ante*, at 876–878. "But a constitution is not intended to embody a particular economic theory . . . . It is made for people of fundamentally differing views." *Lochner* v. *New York*, 198 U. S. 45, 75–76 (1905) (Holmes, J., dissenting). In the heyday of economic due process, Justice Holmes warned:

> "Courts should be careful not to extend [the express] prohibitions [of the Constitution] beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain." *Tyson & Brother* v. *Banton*, 273 U. S. 418, 445–446 (1927) (Holmes, J., dissenting, joined by Brandeis, J.).

Ignoring the wisdom of this observation, the Court fashions its own brand of economic equal protection. In so doing, it supplants a legislative policy endorsed by both Congress and the individual States that explicitly sanctioned the very parochialism in regulation and taxation of insurance that the Court's decision holds illegitimate. This newly unveiled power of the Equal Protection Clause would come as a surprise to the Congress that passed the McCarran-Ferguson Act and the Court that sustained the Act against constitutional attack. In the McCarran-Ferguson Act, Congress expressly sanctioned such economic parochialism in the context of state regulation and taxation of insurance.

The doctrine adopted by the majority threatens the freedom not only of the States but also of the Federal Government to formulate economic policy. The dangers in discerning in the Equal Protection Clause a prohibition against barriers to interstate business irrespective of the Commerce Clause should be self-evident. The Commerce Clause is a flexible tool of economic policy that Congress may use as it sees fit, letting it lie dormant or invoking it to limit as well as promote the free flow of commerce. Doctrines of equal protection are constitutional limits that constrain the acts of federal and state legislatures alike. See, *e. g.*, *Califano* v. *Webster*, 430 U. S. 313 (1977); Cohen, Congressional Power to Validate Unconstitutional State Laws: A Forgotten Solution to an Old Enigma, 35 Stan. L. Rev. 387, 400–413 (1983). The Court's analysis casts a shadow over numerous congressional enactments that adopted as federal policy "the type of parochial favoritism" the Court today finds unconstitutional. *White* v. *Massachusetts Council of Construction Employers, Inc.*, *supra*, at 213. Contrary to the reasoning in *Benjamin*, the Court today indicates the Equal Protection Clause stands as an independent barrier if courts should determine that either Congress or a State has ventured the "wrong" direction down what has become, by judicial fiat, the one-way street of the Commerce Clause. Nothing in the Constitution or our past decisions supports forcing such an economic straitjacket on the federal system.

V

Today's opinion charts an ominous course. I can only hope this unfortunate adventure away from the safety of our precedents will be an isolated episode. I had thought the Court had finally accepted that

> "the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy deter-

> minations made in areas that neither affect fundamental rights nor proceed along suspect lines; in the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment." *New Orleans* v. *Dukes*, 427 U. S., at 303–304 (citations omitted).

Because I believe that the Alabama law at issue here serves legitimate state purposes through concededly rational means, and thus is neither invidious nor arbitrary, I would affirm the court below. I respectfully dissent.

BOARD OF EDUCATION OF OKLAHOMA CITY *v.* NATIONAL GAY TASK FORCE

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 83-2030. Argued January 14, 1985—Decided March 26, 1985

729 F. 2d 1270, affirmed by an equally divided Court.

Dennis W. Arrow argued the cause for appellant. With him on the briefs were *Larry Lewis* and *James B. Croy*.

Laurence H. Tribe argued the cause for appellee. With him on the brief were *William B. Rogers* and *Leonard Graff.**

PER CURIAM.

The judgment is affirmed by an equally divided Court.

JUSTICE POWELL took no part in the decision of this case.

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*Briefs of *amici curiae* urging reversal were filed for Concerned Women for America Education and Legal Defense Foundation by *Jordan W. Lorence;* for the State of Oklahoma by *Michael C. Turpen,* Attorney General, and *David W. Lee,* Assistant Attorney General; for the National School Boards Association by *Gwendolyn H. Gregory, August W. Steinhilber,* and *Thomas A. Shannon;* and for the Washington Legal Foundation by *Daniel J. Popeo, Paul D. Kamenar,* and *George C. Smith.*

Briefs of *amici curiae* urging affirmance were filed for the American Association for Personal Privacy et al. by *Thomas F. Coleman* and *Jay M. Kohorn;* for the American Association of University Professors by *Ann H. Franke, Ralph S. Brown,* and *Matthew Finkin;* for the Center for Constitutional Rights et al. by *Anne E. Simon, Sarah Wunsch,* and *Rhonda Copelon;* for the Lambda Legal Defense and Education Fund, Inc., et al. by *Abby R. Rubenfeld* and *Rosalyn Richter;* for the National Education Association et al. by *Robert Chanin* and *Robert M. Weinberg;* and for the State of New York et al. by *Robert Abrams,* Attorney General of New York, *Robert Hermann,* Solicitor General, *Lawrence S. Kahn,* Assistant Attorney General, and *John K. Van de Kamp,* Attorney General of California.

FUGATE *v.* NEW MEXICO

CERTIORARI TO THE SUPREME COURT OF NEW MEXICO

No. 83-6663. Argued February 19, 1985—Decided March 26, 1985

101 N. M. 58, 678 P. 2d 686, affirmed by an equally divided Court.

J. Thomas Sullivan argued the cause for petitioner. With him on the briefs was *Henry R. Quintero.*

Paul Bardacke, Attorney General of New Mexico, argued the cause for respondent. With him on the briefs was *Anthony Tupler,* Assistant Attorney General.

PER CURIAM.

The judgment is affirmed by an equally divided Court.

JUSTICE POWELL took no part in the decision of this case.

REPORTER'S NOTE

The next page is purposely numbered 1001. The numbers between 904 and 1001 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

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ORDERS FROM FEBRUARY 23 THROUGH MARCH 25, 1985

FEBRUARY 23, 1985

Miscellaneous Order

No. A–641. MATTHESON *v.* PHELPS, SECRETARY, LOUISIANA DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS. Application for stay of execution of sentence of death scheduled for Monday, February 25, 1985, presented to JUSTICE WHITE, and by him referred to the Court, is granted pending the timely filing and disposition by this Court of a petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the sending down of the judgment of this Court. JUSTICE WHITE and JUSTICE REHNQUIST would deny the application. JUSTICE POWELL took no part in the consideration or decision of this application.

FEBRUARY 25, 1985*

Appeals Dismissed

No. 84–1079. BETHUNE PLAZA, INC. *v.* BERNARDI, DIRECTOR OF LABOR OF ILLINOIS. Appeal from App. Ct. Ill., 1st Dist., dismissed for want of substantial federal question. Reported below: 124 Ill. App. 3d 791, 464 N. E. 2d 1116.

No. 84–1092. ZIMMERMAN *v.* ABRAMS, ATTORNEY GENERAL OF NEW YORK, ET AL. Appeal from App. Div., Sup. Ct. N. Y., 4th Jud. Dept., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 101 App. Div. 2d 691, 476 N. Y. S. 2d 29.

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*JUSTICE POWELL took no part in the consideration or decision of the orders announced on this date.

No. 84–5912. CALLOWAY *v.* ALABAMA. Appeal from Sup. Ct. Ala. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 456 So. 2d 308.

Certiorari Granted—Vacated and Remanded

No. 84–5396. JENNINGS *v.* FLORIDA. Sup. Ct. Fla. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Shea* v. *Louisiana*, *ante*, p. 51, and *Smith* v. *Illinois*, 469 U. S. 91 (1984). JUSTICE REHNQUIST dissents. Reported below: 453 So. 2d 1109.

Miscellaneous Orders

No. A–608. CARELLA ET AL. *v.* MUNICIPAL COURT OF LOS ANGELES ET AL. C. A. 9th Cir. Application for stay, addressed to JUSTICE MARSHALL and referred to the Court, denied.

No. A–632 (84–1282). IN RE MURGO. D. C. M. D. Fla. Application for stay, addressed to JUSTICE STEVENS and referred to the Court, denied.

No. D–459. IN RE DISBARMENT OF STACHURSKI. Disbarment entered. [For earlier order herein, see 469 U. S. 915.]

No. D–464. IN RE DISBARMENT OF MCDANIEL. Disbarment entered. [For earlier order herein, see 469 U. S. 1069.]

No. D–465. IN RE DISBARMENT OF PELLE. Disbarment entered. [For earlier order herein, see 469 U. S. 1069.]

No. 83–1961. LANDRETH TIMBER CO. *v.* LANDRETH ET AL. C. A. 9th Cir. [Certiorari granted, 469 U. S. 1016.] Motion of Advance Ross Corp. for leave to file a brief as *amicus curiae* granted.

No. 84–4. WILLIAMSON COUNTY REGIONAL PLANNING COMMISSION ET AL. *v.* HAMILTON BANK OF JOHNSON CITY. C. A. 6th Cir. [Certiorari granted, 469 U. S. 815.] Motion of petitioners for leave to file reply brief out of time granted.

No. 84–468. CITY OF CLEBURNE, TEXAS, ET AL. *v.* CLEBURNE LIVING CENTER, INC., ET AL. C. A. 5th Cir. [Certiorari granted, 469 U. S. 1016.] Motions of Association for Retarded Citizens of the United States et al. and National Association for

Rights Protection and Advocacy et al. for leave to file briefs as *amici curiae* granted.

No. 84-861. NATIONAL LABOR RELATIONS BOARD *v.* INTERNATIONAL LONGSHOREMEN'S ASSN., AFL-CIO, ET AL. C. A. 4th Cir. [Certiorari granted, 469 U. S. 1188.] Motion of respondents New York Shipping Association, Inc., et al. for divided argument granted. Motion of the Solicitor General for divided argument granted.

No. 84-978. EXXON CORP. ET AL. *v.* HUNT, ADMINISTRATOR OF NEW JERSEY SPILL COMPENSATION FUND, ET AL. Appeal from Sup. Ct. N. J. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

Certiorari Granted

No. 84-5636. ALCORN *v.* SMITH, WARDEN. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 740 F. 2d 3.

Certiorari Denied. (See also Nos. 84-1092 and 84-5912, *supra.*)

No. 83-1747. TATE, SUPERINTENDENT, CHILLICOTHE CORRECTIONAL INSTITUTE *v.* ROSE. C. A. 6th Cir. Certiorari denied. Reported below: 722 F. 2d 1277.

No. 83-2052. TEL-OREN, AS FATHER, ON BEHALF OF THE DECEASED, TEL-OREN, ET AL. *v.* LIBYAN ARAB REPUBLIC ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 233 U. S. App. D. C. 384, 726 F. 2d 774.

No. 84-177. ILLINOIS *v.* HAMMOCK. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 121 Ill. App. 3d 874, 460 N. E. 2d 378.

No. 84-256. WILLIAMS *v.* UNITED STATES;
No. 84-292. O'MALLEY ET AL. *v.* UNITED STATES; and
No. 84-585. LOMBARDO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 737 F. 2d 594.

No. 84-587. D'ANTIGNAC *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 739 F. 2d 634.

No. 84-590. RED STAR MARINE SERVICES, INC. *v.* DONOVAN, SECRETARY OF LABOR. C. A. 2d Cir. Certiorari denied. Reported below: 739 F. 2d 774.

No. 84-685. RUSH ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 738 F. 2d 497.

No. 84-834. BARTH ET AL. *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 745 F. 2d 184.

No. 84-877. HILDMANN *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 124 Ill. App. 3d 1149, 480 N. E. 2d 878.

No. 84-890. BROWN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 740 F. 2d 963.

No. 84-904. MCQUISTON *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 746 F. 2d 1489.

No. 84-916. MONROE ET AL. *v.* UNITED AIR LINES, INC., ET AL.; and

No. 84-958. AIR LINE PILOTS ASSN., INTERNATIONAL *v.* HIGMAN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 736 F. 2d 394.

No. 84-919. NEW YORK UNIVERSITY MEDICAL CENTER *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 751 F. 2d 370.

No. 84-923. CARNIVAL CRUISE LINES, INC. *v.* KORNBERG ET UX. C. A. 11th Cir. Certiorari denied. Reported below: 741 F. 2d 1332.

No. 84-975. DEERE & CO. *v.* KINZENBAW ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 741 F. 2d 383.

No. 84-1032. ALCON LABORATORIES, INC., ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 745 F. 2d 105.

No. 84-1055. DRURY *v.* LOUISIANA STATE BAR ASSN. Sup. Ct. La. Certiorari denied. Reported below: 455 So. 2d 1387.

No. 84-1057. HUTCHERSON ET AL. *v.* BOARD OF SUPERVISORS OF FRANKLIN COUNTY, VIRGINIA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 742 F. 2d 142.

No. 84-1060. AUKAMP *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 59 Md. App. 727.

No. 84-1061. MERCHENT ET AL. *v.* CUBBAGE. C. A. 9th Cir. Certiorari denied. Reported below: 744 F. 2d 665.

No. 84-1073. FITZPATRICK *v.* VILLANOVA UNIVERSITY. C. A. 3d Cir. Certiorari denied. Reported below: 751 F. 2d 375.

No. 84-1078. CARSON *v.* INDIANA ET AL. Ct. App. Ind. Certiorari denied. Reported below: 456 N. E. 2d 444.

No. 84-1080. SOUTHERN PACIFIC COMMUNICATIONS CO. ET AL. *v.* AMERICAN TELEPHONE & TELEGRAPH CO. ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 238 U. S. App. D. C. 309, 740 F. 2d 980.

No. 84-1087. DAVIS ET AL. *v.* AVCO FINANCIAL SERVICES, INC. C. A. 6th Cir. Certiorari denied. Reported below: 739 F. 2d 1057.

No. 84-1094. FORNASH *v.* KENTUCKY. Cir. Ct. Ky., Campbell County. Certiorari denied.

No. 84-1095. FITZPATRICK *v.* DIMARTINO, JUDGE, SUPERIOR COURT, LAW DIVISION, GLOUCESTER COUNTY, NEW JERSEY, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 746 F. 2d 1466.

No. 84-1111. SUSSMAN *v.* NEWS JOURNAL CORP. C. A. 11th Cir. Certiorari denied. Reported below: 742 F. 2d 1466.

No. 84-1117. WINSLOW MANUFACTURING, INC., ET AL. *v.* KAIN, DBA BROCK-KAIN. C. A. 10th Cir. Certiorari denied. Reported below: 736 F. 2d 606.

No. 84-1130. DEMPSTER ET AL. *v.* TURNER. C. A. 9th Cir. Certiorari denied. Reported below: 743 F. 2d 1301.

No. 84-1138. GARMAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 748 F. 2d 218.

No. 84-1169. PEEBLES *v.* UNITED STATES POSTAL SERVICE. C. A. Fed. Cir. Certiorari denied. Reported below: 758 F. 2d 662.

No. 84-1189. GRIER *v.* BOARD OF COMMISSIONERS FOR MOORE COUNTY ET AL. C. A. 4th Cir. Certiorari denied.

No. 84–1206. FOOLADI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 746 F. 2d 1027.

No. 84–1215. HENDRICKS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 743 F. 2d 653.

No. 84–1241. KNOBELOCH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 746 F. 2d 1366.

No. 84–5344. LEWIS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 738 F. 2d 916.

No. 84–5594. BRANTLEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 733 F. 2d 1429.

No. 84–5679. ANTONELLI *v.* LUTHER, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 84–5681. CHASE *v.* KING, SECRETARY, LOUISIANA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 733 F. 2d 903.

No. 84–5700. ZOGAIB *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 751 F. 2d 373.

No. 84–5728. CLARK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 776 F. 2d 623.

No. 84–5731. SAYLOR *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied.

No. 84–5822. LEWIS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 103 Ill. 2d 111, 468 N. E. 2d 1222.

No. 84–5868. WELCH *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 745 F. 2d 614.

No. 84–5869. WILSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 746 F. 2d 1480.

No. 84–5898. JOHNSON *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 123 Ill. App. 3d 523, 462 N. E. 2d 1268.

No. 84–5911. JANSSEN *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 124 Ill. App. 3d 1150, 480 N. E. 2d 878.

No. 84–5925. NUEY *v.* DEPARTMENTAL DISCIPLINARY COMMITTEE FOR THE FIRST JUDICIAL DEPARTMENT. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 102 App. Div. 2d 275, 477 N. Y. S. 2d 10.

No. 84–5953. HORTON *v.* DISTRICT OF COLUMBIA ET AL. Ct. App. D. C. Certiorari denied.

No. 84–5984. MARK *v.* ATHMANN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 745 F. 2d 67.

No. 84–5991. BICKLEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 742 F. 2d 1449.

No. 84–5999. MCMINN *v.* D. V. RAMANI, M. D. & ASSOCIATES, INC. Ct. App. Ohio, Summit County. Certiorari denied. Reported below: 20 Ohio App. 3d 167, 485 N. E. 2d 258.

No. 84–6000. D'AGOSTINO *v.* COUNTY OF MADISON ET AL. C. A. 2d Cir. Certiorari denied.

No. 84–6001. ALBERTON *v.* STATE BAR OF CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 37 Cal. 3d 1, 686 P. 2d 1177.

No. 84–6004. REED *v.* JOSEPH ET AL. Sup. Ct. Ore. Certiorari denied.

No. 84–6008. SLEDGE *v.* MORRIS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 84–6009. MOORE *v.* RICE, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 746 F. 2d 1472.

No. 84–6010. AUSTIN *v.* MORAN, DIRECTOR, DEPARTMENT OF CORRECTIONS OF RHODE ISLAND. C. A. 1st Cir. Certiorari denied. Reported below: 753 F. 2d 1067.

No. 84–6016. GENTSCH *v.* LOWE, CLERK, TEXAS COURT OF CRIMINAL APPEALS. C. A. 5th Cir. Certiorari denied.

No. 84–6020. MONTGOMERY *v.* NATIONAL MULTIPLE SCLEROSIS SOCIETY. C. A. D. C. Cir. Certiorari denied.

No. 84–6025. ASH *v.* CVETKOV ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 739 F. 2d 493.

No. 84-6026. CHAMBERLAIN *v.* ERICKSON, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 744 F. 2d 628.

No. 84-6028. ERICKSON *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 120 Wis. 2d 677, 356 N. W. 2d 495.

No. 84-6053. HARRIS *v.* FRIEDLINE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 745 F. 2d 51.

No. 84-6071. MCKINNEY *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 4th Cir. Certiorari denied. Reported below: 749 F. 2d 31.

No. 84-6082. ATTWELL ET AL. *v.* UNITED STATES POSTAL SERVICE ET AL. C. A. 11th Cir. Certiorari denied.

No. 84-6085. HOUSTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 745 F. 2d 333.

No. 84-6100. HAWTHORNE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 751 F. 2d 391.

No. 84-6103. GIGLI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 751 F. 2d 377.

No. 84-6114. PANTOJA-SOTO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 739 F. 2d 1520.

No. 84-6119. OKOT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 745 F. 2d 68.

No. 84-6120. GORGEI *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 749 F. 2d 732.

No. 84-6121. MENIER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 746 F. 2d 1480.

No. 84-6129. THOMAS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 751 F. 2d 378.

No. 84-6130. RIECK *v.* WOOD, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied.

No. 84-6136. MARINO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 751 F. 2d 377.

No. 83-654. TEXAS *v.* WILKERSON. Ct. Crim. App. Tex. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 657 S. W. 2d 784.

No. 84–723. GARRAGHTY, WARDEN, ET AL. *v.* HINTON. C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 740 F. 2d 962.

No. 83–6646. YOUNG *v.* ZANT, WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER. C. A. 11th Cir.;
No. 84–5504. YBARRA *v.* NEVADA. Sup. Ct. Nev.;
No. 84–5683. LAMB *v.* TEXAS. Ct. Crim. App. Tex.;
No. 84–5794. CLISBY *v.* ALABAMA. Sup. Ct. Ala.; and
No. 84–6011. COLEMAN *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied. Reported below: No. 83–6646, 727 F. 2d 1489; No. 84–5504, 100 Nev. 167, 679 P. 2d 797; No. 84–5683, 680 S. W. 2d 11; No. 84–5794, 456 So. 2d 105.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 84–532. ROWLAND *v.* MAD RIVER LOCAL SCHOOL DISTRICT, MONTGOMERY COUNTY, OHIO. C. A. 6th Cir. Certiorari denied. Reported below: 730 F. 2d 444.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

This case raises important constitutional questions regarding the rights of public employees to maintain and express their private sexual preferences. Petitioner, a public high school employee, "was fired because she was a homosexual who revealed her sexual preference—and, as the jury found, for no other reason." 730 F. 2d 444, 454 (CA6 1984) (Edwards, J., dissenting). Because determination of the appropriate constitutional analysis to apply in such a case continues to puzzle lower courts and because this Court has never addressed the issues presented, I would grant certiorari and set this case for oral argument.

I

In December 1974, petitioner was suspended from her nontenured position as a high school guidance counselor. In April

1975, the respondent School District acting through its School Board decided not to renew petitioner's contract. A jury later made unchallenged findings that petitioner was suspended and not rehired solely because she was bisexual and had told her secretary and some fellow teachers that she was bisexual, and not for "any other reason." See *id.*, at 460 (Special Verdict VIII). The jury also found that petitioner's mention of her bisexuality did not "in any way interfere with the proper performance of [her or other school staff members'] duties or with the regular operation of the school generally." *Id.*, at 456–458 (Special Verdicts I, II, and III). The jury concluded that petitioner had suffered damages as a result of the decisions to suspend and not rehire her in the form of personal humiliation, mental anguish, and lost earnings.

The trial judge ruled that these findings supported petitioner's claims for violation of her constitutional right to free speech under *Pickering* v. *Board of Education*, 391 U. S. 563 (1968), and to equal protection of the laws under the Fourteenth Amendment.[1] He therefore entered a judgment for damages for petitioner.

The Court of Appeals for the Sixth Circuit reversed. The court first ruled that in light of our intervening decision in *Connick* v. *Myers*, 461 U. S. 138 (1983), the decision to discharge petitioner based on her workplace statements was unobjectionable under the First Amendment because petitioner's speech was not about "a matter of public concern." 730 F. 2d, at 451. While accepting the jury's finding that petitioner's mention of her bisexuality had not interfered "in any way" with the "regular operation of the school," the court concluded that it was constitutionally permissible to dismiss petitioner "for talking about it." *Id.*, at 450. Second, the court held that no equal protection claim could possibly have been made out, because there was presented "no evidence of how other employees with different sexual preferences were treated." *Ibid.* Without citation to any precedent, the court characterized the judgment for petitioner in the absence of such comparative evidence as "plain error."[2]

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[1] United States Magistrate Robert A. Steinberg, presiding by agreement of the parties pursuant to 28 U. S. C. § 636. His opinion is reprinted at 1 App. to Record (Rec. App.) 97–111.

[2] This ruling overturned the jury's clear finding to the contrary that when the school Principal and Superintendent had suspended petitioner and recommended to the School Board that she not be rehired, they had "treated [petitioner] differently than similarly situated employees, because she was

II

This case starkly presents issues of individual constitutional rights that have, as the dissent below noted, "swirled nationwide for many years." *Id.*, at 453 (Edwards, J., dissenting). Petitioner did not lose her job because she disrupted the school environment or failed to perform her job. She was discharged merely because she is bisexual and revealed this fact to acquaintances at her workplace. These facts are rendered completely unambiguous by the jury's findings. Yet after a jury and the trial court who heard and evaluated the evidence rendered verdicts for petitioner, the court below reversed based on a crabbed reading of our precedents and unexplained disregard of the jury and judge's factual findings. Because they are so patently erroneous, these maneuvers suggest only a desire to evade the central question: may a State dismiss a public employee based on her bisexual status alone? I respectfully dissent from the Court's decision not to give its plenary attention to this issue.

A

That petitioner was discharged for her nondisruptive mention of her sexual preferences raises a substantial claim under the First Amendment. "For at least 15 years, it has been settled that a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." 461 U. S., at 142.[3] Nevertheless, *Connick* held

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homosexual/bisexual." 730 F. 2d, at 458–459 (Special Verdict V). The Court of Appeals also criticized the trial judge for "ignor[ing]" an additional finding that petitioner had not properly performed her job on one occasion when she had identified two homosexual students that she was counseling to her secretary. *Id.*, at 450; see *id.*, at 459 (Special Verdict V, question 9); 2 Rec. App. 96–99. Of course, because the jury had determined that the one incident of poor performance was not a motivating factor in the decision to fire petitioner, it was entirely correct for the trial judge not to consider the incident in entering judgment for petitioner. Cf. *Mt. Healthy City Board of Ed.* v. *Doyle*, 429 U. S. 274, 287 (1977) (plaintiff must show that constitutionally protected conduct was "motivating factor" in hiring decision, and that school board would not have reached same decision absent that conduct).

[3] In *Pickering* v. *Board of Education*, 391 U. S. 563, 574 (1968), we unanimously held that "a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment." Our subsequent decisions demonstrate that decisions not to rehire nontenured public employees may be challenged under the *Pickering* First

that if "employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community," disciplinary measures taken in response to such expression cannot be challenged under the First Amendment "absent the most unusual circumstances." *Id.*, at 146, 147. The court below ruled that *Connick* requires the conclusion that a bisexual public employee constitutionally may be dismissed for "talking about it." This conclusion does not result inevitably from *Connick*, and may be questioned on at least two grounds: first, because petitioner's speech did indeed "touch upon" a matter of public concern, see *id.*, at 149, and second, because speech even if characterized as private is entitled to constitutional protection when it does not in any way interfere with the employer's business.

Connick recognized that some issues are "inherently of public concern," citing "racial discrimination" as one example. *Id.*, at 148, n. 8. I think it impossible not to note that a similar public debate is currently ongoing regarding the rights of homosexuals. The fact of petitioner's bisexuality, once spoken, necessarily and ineluctably involved her in that debate.[4] Speech that "touches upon" this explosive issue is no less deserving of constitutional attention than speech relating to more widely condemned forms of discrimination.

Connick's reference to "matters of public concern" does not suggest a strict rule that an employee's first statement related to a volatile issue of public concern must go unprotected, simply because it is the first statement in the public debate. Such a rule would reduce public employees to second-class speakers, for they would be prohibited from speaking until and unless others first bring an issue to public attention. Cf. *Egger* v. *Phillips*, 710 F. 2d 292, 317 (CA7 1983) (en banc) ("[T]he unpopularity of the issue surely does not mean that a voice crying out in the wilderness is entitled to less protection than a voice with a large, receptive audience"). It is the *topic* of the speech at issue, and not whether

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Amendment rationale. See, *e. g., Mt. Healthy City Board of Ed.* v. *Doyle, supra; Perry* v. *Sindermann*, 408 U. S. 593 (1972).

[4] As the dissent below noted, once petitioner's bisexuality became known through her mention of it, "it [became] an important matter of public concern" in southern Ohio. 730 F. 2d, at 453.

a debate on that topic is yet ongoing, that *Connick* directed federal courts to examine.[5]

Moreover, even if petitioner's speech did not so obviously touch upon a matter of public concern, there remains a substantial constitutional question, reserved in *Connick*, whether it lies "totally beyond the protection of the First Amendment" given its nondisruptive character. See 461 U. S., at 147.[6] The recognized goal of the *Pickering-Connick* rationale is to seek a "balance" between the interest of public employees in speaking freely and that of public employers in operating their workplaces without disruption. See 461 U. S., at 142, 154; *Pickering*, 391 U. S., at 568–569. As the jury below found, however, the latter interest simply is not implicated in this case. In such circumstances, *Connick* does not require that the former interest still receive no constitutional protection. *Connick*, and, indeed, all our precedents in this area, addressed discipline taken against employees for statements that arguably had some disruptive effect in the workplace. See, *e. g.*, 461 U. S., at 151 ("mini-insurrection"); *Mt. Healthy City Board of Ed.* v. *Doyle*, 429 U. S. 274, 285 (1977) ("dramatic and perhaps abrasive incident"); *Pickering*, *supra*, at 569 ("critical statements"). This case, however, involves no critical statements, but rather an entirely harmless mention of a fact about petitioner that apparently triggered certain prejudices held by her supervisors. Cf. *Terminiello* v. *Chicago*, 337 U. S. 1, 4–5 (1949). The Court carefully noted in *Connick* that it did "not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged." 461 U. S., at 154. This case poses the open question whether nondisruptive speech ever can constitutionally serve as the basis for termination under the First Amendment.

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[5] See *Van Ooteghem* v. *Gray*, 654 F. 2d 304 (CA5 1981) (en banc) *(per curiam)* (termination of a public employee because he reveals homosexuality and intention to speak publicly on that topic "clearly" constitutes *Pickering* violation).

[6] Many courts have noted that the disruptive potential of speech remains a vital component of First Amendment analysis in any public employment context after *Connick*. See, *e. g.*, *Curl* v. *Reavis*, 740 F. 2d 1323, 1329, n. 5 (CA4 1984); *Agromayor* v. *Colberg*, 738 F. 2d 55, 61 (CA1 1984); *McBee* v. *Jim Hogg County, Texas*, 730 F. 2d 1009, 1017 (CA5 1984) (en banc); *Berry* v. *Bailey*, 726 F. 2d 670, 676 (CA11 1984); *McGee* v. *South Pemiscot School District*, 712 F. 2d 339, 342–343, n. 4 (CA8 1983); *Egger* v. *Phillips*, 710 F. 2d 292, 320, nn. 29, 30 (CA7 1983) (en banc); *McKinley* v. *City of Eloy*, 705 F. 2d 1110, 1115 (CA9 1983).

B

Apart from the First Amendment, we have held that "[a] State cannot exclude a person from . . . any . . . occupation . . . for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment." *Schware* v. *Board of Bar Examiners*, 353 U. S. 232, 238–239 (1957). And in applying the Equal Protection Clause, "we have treated as presumptively invidious those classifications that disadvantage a 'suspect class,' or that impinge upon the exercise of a 'fundamental right.'" *Plyler* v. *Doe*, 457 U. S. 202, 216–217 (1982) (footnote omitted); see also *id.*, at 245 (BURGER, C. J., dissenting) ("The Equal Protection Clause protects against arbitrary and irrational classifications, and against invidious discrimination stemming from prejudice and hostility"). Under this rubric, discrimination against homosexuals or bisexuals based solely on their sexual preference raises significant constitutional questions under both prongs of our settled equal protection analysis.

First, homosexuals constitute a significant and insular minority of this country's population.[7] Because of the immediate and severe opprobrium often manifested against homosexuals once so identified publicly, members of this group are particularly powerless to pursue their rights openly in the political arena. Moreover, homosexuals have historically been the object of pernicious and sustained hostility, and it is fair to say that discrimination against homosexuals is "likely . . . to reflect deep-seated prejudice rather than . . . rationality." *Id.*, at 216, n. 14. State action taken against members of such groups based simply on their status as members of the group traditionally has been subjected to strict, or at least heightened, scrutiny by this Court.[8]

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[7] Judge Edwards' dissent cited evidence indicating that homosexuals may constitute from 8–15% of the average population. 730 F. 2d, at 455–456 (citing J. Marmor, Homosexual Behavior: A Modern Reappraisal (1980)). He concluded that nonheterosexual preference, like minority race status, "evoke[s] deeply felt prejudices and fears on the part of many people." 730 F. 2d, at 453.

[8] See, *e. g.*, *Mississippi University for Women* v. *Hogan*, 458 U. S. 718, 723–724 (1982) (discrimination based on gender); *Trimble* v. *Gordon*, 430 U. S. 762, 767 (1977) (discrimination based on illegitimacy); *Loving* v. *Virginia*, 388 U. S. 1, 11 (1967) (discrimination based on race); *Korematsu* v. *United States*,

Second, discrimination based on sexual preference has been found by many courts to infringe various fundamental constitutional rights, such as the rights to privacy or freedom of expression.[9] Infringement of such rights found to be "explicitly or implicitly guaranteed by the Constitution," *San Antonio Independent School District* v. *Rodriguez*, 411 U. S. 1, 33–34 (1973), likewise requires the State to demonstrate some compelling interest to survive strict judicial scrutiny. *Plyler*, *supra*, at 217. I have previously noted that a multitude of our precedents supports the view that public employees maintain, no less than all other citizens, a fundamental constitutional right to make "private choices involving family life and personal autonomy." *Whisenhunt* v. *Spradlin*, 464 U. S. 965, 971 (1983) (dissenting from denial of certiorari). Whether constitutional rights are infringed in sexual preference cases, and whether some compelling state interest can be advanced to permit their infringement, are important

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323 U. S. 214, 216 (1944) (discrimination based on national origin); see also *Plyler* v. *Doe*, 457 U. S. 202, 218–223 (1982) (suggesting heightened scrutiny for discrimination against alien children).

[9] See, *e. g.*, *Gay Alliance of Students* v. *Matthews*, 544 F. 2d 162, 167 (CA4 1976) (refusal to allow homosexual student group equal access to state university facilities invalidated because infringement of First Amendment rights to expression and association not supported by any "substantial governmental interest"); *benShalom* v. *Secretary of the Army*, 489 F. Supp. 964, 969, 973–977 (ED Wis. 1980) (regulation requiring discharge based on homosexual "tendencies, desire, or interest, but . . . without overt homosexual acts" held unconstitutional as violative of First and Ninth Amendment rights and right to privacy); *New York* v. *Onofre*, 51 N. Y. 2d 476, 487–488, 492, n. 6, 415 N. E. 2d 936, 940, 942, n. 6 (1980) (criminal statute prohibiting private homosexual conduct found to infringe constitutional rights to privacy and equal protection under "compelling state interest" test), cert. denied, 451 U. S. 987 (1981). See also *Rich* v. *Secretary of the Army*, 735 F. 2d 1220, 1227, n. 7, 1228–1229 (CA10 1984) (noting "significant split of authority as to whether some private consensual homosexual behavior may have constitutional protection" but finding military's "compelling interest" in regulating homosexual conduct sufficient to uphold discharge based on false denial of homosexuality); *Beller* v. *Middendorf*, 632 F. 2d 788, 809–810 (CA9 1980) (same), cert. denied *sub nom. Beller* v. *Lehman*, 452 U. S. 905 (1981); but see *Dronenburg* v. *Zech*, 239 U. S. App. D. C. 229, 236–239, 741 F. 2d 1388, 1395–1398 (1984) (naval discharge for homosexual conduct upheld as "rationally related" to permissible goals of the military; no constitutional right of privacy implicated). See generally Karst, The Freedom of Intimate Association, 89 Yale L. J. 624, 682–686 (1980); Symposium: Sexual Preference and Gender Identity, 30 Hastings L. J. 799–1181 (1979).

questions that this Court has never addressed, and which have left the lower courts in some disarray. See n. 9, *supra;* cf. *Carey* v. *Population Services International*, 431 U. S. 678, 688, n. 5, 694, n. 17 (1977).[10]

Finally, even if adverse state action based on homosexual *conduct* were held valid under application of traditional equal protection principles, such approval would not answer the question, posed here, whether the mere nondisruptive *expression* of homosexual preference can pass muster even under a minimal rationality standard as the basis for discharge from public employment. This record plainly demonstrates that petitioner did not proselytize regarding her bisexuality, but rather that it became known simply in the course of her normal workday conversations.[11]

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[10] In this case, the School District has not even attempted to posit some legitimate interest that was advanced by terminating petitioner for her *nondisruptive* mention of her sexual preference. The School District had a full and fair opportunity to persuade a jury that petitioner's bisexuality or her mention of it interfered with some aspect of school administration, but the jury found to the contrary.

[11] Petitioner's first mention of her bisexuality at school apparently came in response to friendly but repeated questions from her secretary as to why petitioner seemed in a particularly "good mood" one day. When petitioner eventually responded that she was in love with a woman, the secretary apparently was upset by the unexpected answer, and reported it to petitioner's Principal. 2 Rec. App. 101–102. On another occasion, petitioner was confronted by an angry mother who wanted to know why petitioner was counseling her to accept her son's expressed homosexuality when such conduct was "against the Bible." Petitioner did not inform the mother of her own preferences, but did inform her Vice Principal, because she was "uneasy" that if the mother complained her own "job would be at stake." *Id.*, at 105–107. Finally, petitioner mentioned her bisexuality to some of her fellow teachers, first simply in the course of her friendships with them and later to enlist their support when it became clear that she would be disciplined for her bisexuality. *Id.*, at 102–104, 113.

This evidence indicates that petitioner's "speech" perhaps is better evaluated as no more than a natural consequence of her sexual orientation, in the same way that co-workers generally know whom their fellow employees are dating or to whom they are married. Under this view, petitioner's First Amendment and equal protection claims may be seen to converge, because it is realistically impossible to separate her spoken statements from her status. The suggestion below that it was error not to separate the claims precisely for the jury's benefit, and reliance on that suggestion to avoid discussion of the merits of petitioner's claim, see 730 F. 2d, at 450, again simply exposes the Court of Appeals' reluctance to confront forthrightly the difficult issues posed

The School District agreed to submit the issue of disruption to the jury, and the jury found that knowledge of petitioner's non-heterosexual status did not interfere with the school's operation "in any way." I have serious doubt in light of that finding whether the result below can be upheld under any standard of equal protection review.[12]

III

The issues in this case are clearly presented.[13] By reversing the jury's verdict, the Court of Appeals necessarily held that adverse state action taken against a public employee based solely

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by petitioner's case. The jury's role was to find the facts, which it did in detail. It is the court's proper role to analyze, not avoid, those facts in light of the applicable legal principles.

[12] Cf. *Gay Alliance of Students*, *supra*, at 166 (a statute criminalizing mere "status" of being homosexual would be unconstitutional) (dictum); *benShalom*, *supra*, at 969, 973–977 (regulation requiring discharge based on homosexual "interest" without evidence of conduct held unconstitutional absent showing that soldier's "sexual preferences interfered with her abilities as a soldier or adversely affected other members of the Service").

[13] The Court of Appeals' argument that petitioner's claim should not be considered because there was no evidence in the record of how "similarly situated" heterosexual teachers were treated is mere makeweight. We have recognized that, "[a]s in any lawsuit," a discrimination plaintiff "may prove his case by direct or circumstantial evidence." *U. S. Postal Service Bd. of Governors* v. *Aikens*, 460 U. S. 711, 714, n. 3 (1983). This record is replete with direct evidence that petitioner's superiors discriminated against her because of her sexual preference. A jury is entitled to make rational inferences and apply its common-sense knowledge of the world, which includes the knowledge that most teachers are openly heterosexual and yet go undisciplined for that sexual preference. The jury's finding to that effect is reflected in its Special Verdict V. See n. 2, *supra*. The Court of Appeals' substitution of its own evaluation of the evidence for that of the factfinder's, on this and other questions, see nn. 2, 10, 11, *supra*, is simply impermissible. See *Sentilles* v. *Inter-Caribbean Shipping Corp.*, 361 U. S. 107, 109–110 (1959). This is especially so where, as here (see 1 Rec. App. 149–150), the defendant made no motion for a directed verdict prior to submission to the jury. See, *e. g.*, *Wells* v. *Hico Independent School Dist.*, 736 F. 2d 243, 249 (CA5 1984). As the dissent below lucidly explained:

> "The jury clearly did not believe that the above actions would have been taken against [petitioner] if she had not admitted a sexual preference which [the school Superintendent, Principal] and, ultimately, the School Board disapproved of. The question was one of credibility and logical inference which the jury was uniquely positioned to resolve." 730 F. 2d, at 454.

on his or her expressed sexual preference is constitutional. Nothing in our precedents requires that result; indeed, we have never addressed the topic. Because petitioner's case raises serious and unsettled constitutional questions relating to this issue of national importance, an issue that cannot any longer be ignored, I respectfully dissent from the decision to deny this petition for a writ of certiorari.[14]

No. 84-5720. GREGORY *v.* TOWN OF PITTSFIELD ET AL. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 479 A. 2d 1304.

JUSTICE O'CONNOR, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

This petition raises important and unresolved issues concerning the protection afforded by the Due Process Clause of the Fourteenth Amendment to applicants for general assistance. Because the decision below relies on a questionable reading of this Court's precedent to hold that such applicants are entitled to no procedural safeguards whatsoever and, alternatively, that state law remedies provide sufficient due process, I would grant certiorari.

Petitioner Cindy Gregory and her husband on April 13, 1982, filed an application with respondent town of Pittsfield, Maine, seeking general assistance in order to pay their rent. The Town Manager, respondent Gene Moyers, denied this request on the grounds that Mrs. Gregory had quit her job and had spent an Aid to Families with Dependent Children check to obtain her husband's release from jail. Contrary to the requirements of state law, Moyers did not provide a written notice of this decision informing Mrs. Gregory of her right to an administrative hearing.[1] Mrs. Gregory unsuccessfully requested assistance again on April 16. On the morning of April 23, she filed an action in the Superior Court of Somerset County, State of Maine, requesting a temporary restraining order against the town's denial of general assistance. The court directed Mrs. Gregory to exhaust the administrative hearing procedure established by Me. Rev. Stat. Ann., Tit. 22, § 4507 (1980), and instructed the town's hearing authority to follow the decision of the Maine Supreme Court in *Page* v. *City of Auburn*, 440 A. 2d 363 (1982), which held that voluntary termination of employment is not a valid ground for denying general assistance. On the afternoon of April 23, Mrs. Gregory went to the Pittsfield Municipal Office and filed written requests for general assistance and for an administrative hearing on the denial of her April 13 application. The request for assistance was denied, and the town again failed to provide Mrs. Gregory with written notice of the decision. On April 29, 1983, the town's hearing authority upheld the denial of benefits requested on April 13 and refused to review the denial of the April 23 application.

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[14] The District Court based its judgment against the School District for petitioner's damages on two factual findings. First, the court found that the School Board itself had violated petitioner's rights by acting not to renew her contract for the same impermissible reasons that had motivated the administrators' actions. Second, although the court ruled that the school administrators had taken their actions against petitioner in good faith, it found that the Superintendent had acted as "a policymaker or decisionmaker" for the School District. 1 Rec. App. 106. See *Owen* v. *City of Independence*, 445 U. S. 622, 656 (1980). The Court of Appeals, however, concluded that petitioner could not recover her damages from the School District. In light of the trial judge's factual findings on this point, the latter decision was so clearly erroneous that I would reverse the decision as to liability without argument and limit oral argument to the *Connick* and equal protection questions discussed above.

Thwarted in her efforts to obtain assistance, Mrs. Gregory then filed an action in Superior Court requesting review of the hearing authority's decision pursuant to state law and also seeking relief under 42 U. S. C. § 1983 for alleged constitutional deprivations. The Superior Court held that Mrs. Gregory was entitled to an award of assistance based on the April 13 application and that the town's hearing authority had violated statutory requirements by refusing to hold a hearing on her April 23 application. Moreover, the court found that the town's policy was not to provide applicants with a written decision unless the applicant went to the Municipal Office and submitted a request. This policy, along with the refusal to hold a hearing on the April 23 application, "flagrantly violated the statutory procedures for the administration of the general assistance program." App. 2 to Pet. for Cert. 6 (footnote omitted). The Superior Court further found that the town's failure to provide Mrs. Gregory written notice of her right to a hearing to review the denial of benefits and the subsequent refusal to conduct such a hearing constituted a denial of due process in violation of the Fourteenth Amendment. Before damages were determined with respect to the due process claim, the Superior Court amended its earlier decision in light of *Jackson* v. *Inhabitants of Town of Searsport*, 456 A. 2d 852 (Me.), cert. denied *sub nom. Jackson* v. *Handley*, 464 U. S. 825 (1983), to hold that petitioner did not have a cognizable claim of a denial of due process. Consequently, the court dismissed with prejudice Mrs. Gregory's § 1983 claim.

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[1] The general assistance statute in effect at the time required that a decision concerning an applicant's eligibility be made within 24 hours after an application was submitted. Me. Rev. Stat. Ann., Tit. 22, § 4504(3)(C) (1980). Furthermore, the statute required that an applicant be provided written notice explaining the reasons for the decision and the right to an administrative hearing. § 4505. The administrative hearing was to be held within seven days of receipt of a written request for a hearing. § 4507.

Maine has since replaced its previous general assistance statute. 1983 Me. Acts, ch. 577, § 1. See Me. Rev. Stat. Ann., Tit. 22, §§ 4301–4324 (Supp. 1984–1985). The new provisions also contain requirements for written notice of a right to hearing. See §§ 4321, 4322.

The Maine Supreme Judicial Court affirmed the dismissal of the § 1983 claim on alternative grounds. 479 A. 2d 1304 (1984). First, the state court noted that under state law, general assistance grants are made on the basis of a specific determination of need. Recipients are not eligible for continued payments simply on the basis of prior benefits, but instead must make a *de novo* showing of eligibility to obtain each particular grant. Me. Rev. Stat. Ann., Tit. 22, § 4450(2) (1980). This fact, the Supreme Judicial Court concluded, implies that an applicant for general assistance does not have a property interest in benefits until he or she is found eligible to receive such assistance. "Without this determination, an applicant, no matter what his financial status, has no more than an abstract expectancy of benefits, which in no case can rise to the level of a constitutionally protected property right." 479 A. 2d, at 1308. In the alternative, the Supreme Judicial Court held that even if Mrs. Gregory was entitled to the protections of due process, *Parratt* v. *Taylor*, 451 U. S. 527 (1981), indicated that state procedures afforded all the process due. 479 A. 2d, at 1308–1309. Under state law, unsuccessful applicants for assistance are entitled to an administrative hearing and judicial review. Pursuant to those provisions, after the Superior Court issued its first decision in February 1983, the town awarded Mrs. Gregory the assistance that it had denied the previous April. See *id.*, at 1306, n. 2. Relying on its decision in *Jackson* v. *Town of Searsport*, *supra*, the Supreme Judicial Court concluded that state law remedies were adequate to compensate petitioner and her husband for any loss and thereby satisfied the requirements of due process. 479 A. 2d, at 1308.

The conclusion of the Supreme Judicial Court that an applicant for general assistance does not have an interest protected by the Due Process Clause is unsettling in its implication that less fortunate persons in our society may arbitrarily be denied benefits that a State has granted as a matter of right. There is no dispute that Mrs. Gregory was entitled under Maine law to the general assistance benefits denied to her in April 1982. We have held that state statutes or regulations prescribing the substantive predicates for state action may create liberty interests protected by due process. *Hewitt* v. *Helms*, 459 U. S. 460, 470–472 (1983) (finding that prisoner had protected liberty interest in remaining in general prison population). One would think that where state law creates an entitlement to general assistance based on certain substantive conditions, there similarly results a property interest that warrants at least some procedural safeguards. Cf. *Greenholtz* v. *Nebraska Penal Inmates*, 442 U. S. 1, 12 (1979) (finding parole applicant's expectancy of release entitled to some measure of constitutional protection). Although this Court has never addressed the issue whether applicants for general assistance have a protected property interest, see *Peer* v. *Griffeth*, 445 U. S. 970 (1980) (REHNQUIST, J., dissenting from denial of certiorari), the weight of authority among lower courts is contrary to the conclusion of the Supreme Judicial Court. See, *e. g.*, *Daniels* v. *Woodbury County, Iowa*, 742 F. 2d 1128, 1132–1133 (CA8 1984); *Griffeth* v. *Detrich*, 603 F. 2d 118, 120–121 (CA9 1979), cert. denied *sub nom. Peer* v. *Griffeth, supra; White* v. *Roughton*, 530 F. 2d 750, 755 (CA7 1976); *Johnston* v. *Shaw*, 556 F. Supp. 406, 412–413 (ND Tex. 1982). But see *Zobriscky* v. *Los Angeles County*, 28 Cal. App. 3d 930, 105 Cal. Rptr. 121 (1972).

Assuming that applicants for general assistance are entitled to some procedural safeguards, the Supreme Judicial Court further held that the statutory procedures afforded by state law provide sufficient process. This conclusion rests on a reading of *Parratt* v. *Taylor* that is more expansive than this Court previously has endorsed. *Parratt* held that a postdeprivation state tort action afforded all the process that was due to remedy a "tortious loss of . . . property as a result of a random and unauthorized act by a state employee." 451 U. S., at 541. See also *Hudson* v. *Palmer*, 468 U. S. 517, 533 (1984) (applying *Parratt* to unauthorized, intentional deprivation of property by a state employee). The present case is far removed from the facts of *Parratt*, where prison employees negligently lost an inmate's mail-order hobby kit. In contrast, here the town of Pittsfield had a policy, contrary to the requirements of state law, not to provide written notice to applicants denied general assistance. If we assume, *arguendo*, that due process requires the provision of such notice, it is questionable whether *Parratt* suggests that a municipal policy denying those procedures comports with the Constitution so long as state law makes some remedy available. Cf. *Logan* v. *Zimmerman Brush Co.*, 455 U. S. 422, 435–436 (1982) (postdeprivation remedies do not satisfy due process where deprivation is caused by established state procedures).

Parratt reasoned that postdeprivation procedures may satisfy the requirements of due process in circumstances in which predeprivation process is impracticable. 451 U. S., at 539–541. In the context of unauthorized deprivations by individual state employees, the State cannot possibly provide a meaningful predeprivation hearing, and therefore adequate postdeprivation state remedies may satisfy the procedural requirements of the Due Process Clause. *Id.*, at 541–542; see also *Hudson* v. *Palmer*, *supra*, at 533. This reasoning cannot readily be extended to the facts of the present case. First, the deprivation involved here did not result from the unauthorized conduct of individual employees, but instead reflected the town's policy. Second, the alleged denial of due process was not the town's failure to provide a hearing prior to denying the application for general assistance. Instead, petitioner complains of the town's refusal to provide her with notice explaining the decision and informing her of a statutory right to a hearing. It does not seem impracticable to insist that the town afford these minimal procedural protections.[2]

Even if the reasoning of *Parratt* applies in circumstances in which a municipal policy causes deprivations of protected property interests, it is by no means clear that the state law remedies available in the instant case are adequate. The state procedures did allow Mrs. Gregory to obtain grants of general assistance nearly one year after her application was improperly denied. Those procedures, however, made no provision for the recovery of damages resulting from the town's failure to provide her with notice or a prompt hearing. Mrs. Gregory's complaint alleged that as a result of the town's actions, she and her children were forced to leave their home and to move to another town. Any state tort action against the town or responsible employees apparently would be barred by the immunity provisions of the Maine Tort Claims Act, Me. Rev. Stat. Ann., Tit. 14, §§ 8103, 8111 (1980). Although *Parratt* acknowledged that state remedies may be adequate even though they may not provide a plaintiff with as large a recovery as he might receive in a § 1983 action, 451 U. S., at 544, it would be a novel extension of that proposition to infer that eventual restoration of a property interest, no matter how belated, constitutes an adequate remedy for the intervening deprivation and any consequent damages. Cf. *ibid.* (noting that available state remedies could fully compensate for property loss).

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[2] Indeed, the Superior Court noted that the town had previously entered into a consent decree related to its refusal to follow the procedural requirements of Maine's general assistance statute. *Grass* v. *Commissioner of Dept. of Human Services*, Civ. Action No. 79–31–SD (Me., Mar. 31, 1980), App. 2 to Pet. for Cert. 6–7, n. 3.

By suggesting that an applicant for general assistance may arbitrarily be denied benefits, the holding below adopts a proposition not endorsed previously by this Court and in conflict with the decisions of several other courts. Moreover, our previous decisions do not easily support the conclusion below that if applicants are entitled to some procedural safeguards, postdeprivation procedures are sufficient to remedy a municipal policy of denying unsuccessful applicants a required written notice explaining their right to an administrative hearing. The reasoning of the Supreme Judicial Court is troubling in its general implications as well as its application in this case. Consequently, I respectfully dissent from the denial of certiorari.

No. 84–5829. McKinley *v.* Illinois. Sup. Ct. Ill. Certiorari denied. Justice Brennan would grant certiorari. Reported below: 103 Ill. 2d 111, 468 N. E. 2d 1222.

No. 84–5969. Lindsey *v.* Alabama. Sup. Ct. Ala. Certiorari denied. Justice Marshall would grant certiorari. Reported below: 456 So. 2d 393.

Justice Brennan, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would grant certiorari and vacate the death sentence in this case.

Rehearing Denied

No. 84–336. BUSHEY ET AL. *v.* NEW YORK STATE CIVIL SERVICE COMMISSION ET AL., 469 U. S. 1117;

No. 84–629. MERRILL LYNCH, PIERCE, FENNER & SMITH, INC. *v.* MCCOLLUM ET AL., 469 U. S. 1127;

No. 84–653. SCHLEIFER *v.* CHILDREN'S MEMORIAL HOSPITAL, 469 U. S. 1108;

No. 84–692. HAWKINS *v.* ALEX. BROWN & SONS ET AL., 469 U. S. 1108;

No. 84–707. DUNN *v.* UNITED STATES ET AL., 469 U. S. 1132;

No. 84–781. IOWA EXPRESS DISTRIBUTION, INC. *v.* NATIONAL LABOR RELATIONS BOARD, 469 U. S. 1088;

No. 84–784. TRACEY *v.* UNITED STATES, 469 U. S. 1109;

No. 84–5502. CAMPBELL *v.* CLARK, SECRETARY OF THE INTERIOR, 469 U. S. 1193;

No. 84–5545. SPIVEY *v.* GEORGIA, 469 U. S. 1132;

No. 84–5684. BOLES *v.* BAKER ET AL., 469 U. S. 1113;

No. 84–5810. BROWN *v.* YOUNG ET AL., 469 U. S. 1194; and

No. 84–5926. SAUNDERS *v.* UNITED STATES, 469 U. S. 1196. Petitions for rehearing denied.

No. 83–6350. MCCORQUODALE *v.* BALKCOM, WARDEN, ET AL., 466 U. S. 954. The orders entered May 21, 1984 [467 U. S. 1202], suspending the effect of the order denying the petition for writ of certiorari and staying execution of sentence of death are vacated. Petition for rehearing denied.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we dissent from the Court's order vacating the stay of execution in this case.

MARCH 1, 1985

Dismissal Under Rule 53

No. 75–6990. BALL *v.* DUNLAP, CHAIRMAN, RHODE ISLAND STATE PILOTAGE COMMISSION, ET AL. C. A. 1st Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 532 F. 2d 767.

MARCH 4, 1985*

Appeals Dismissed

No. 84–1214. CHARLES *v.* KENTUCKY. Appeal from Ct. App. Ky. dismissed for want of substantial federal question.

No. 84–6049. RAPHAEL-JOHNSON *v.* DISTRICT OF COLUMBIA. Appeal from Ct. App. D. C. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Certiorari Granted—Vacated and Remanded

No. 83–613. UNITED STATES *v.* ROBINSON. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Young*, *ante*, p. 1. JUSTICE BRENNAN would deny certiorari. Reported below: 716 F. 2d 1095.

Certiorari Granted—Reversed. (See No. 84–914, *ante*, p. 409.)

Miscellaneous Orders

No. A–642. BROWNLEE *v.* UNITED STATES. D. C. Del. Application for stay, presented to JUSTICE O'CONNOR, and by her referred to the Court, denied.

No. D–479. IN RE DISBARMENT OF GOFFEN. It is ordered that William Goffen, of Brooklyn, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–480. IN RE DISBARMENT OF BLACK. It is ordered that Warren J. Black, of New York City, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–481. IN RE DISBARMENT OF GOLD. It is ordered that Eugene Gold, of Brooklyn, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

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*JUSTICE POWELL took no part in the consideration or decision of the orders announced on this date.

No. 84-261. COMMODITY FUTURES TRADING COMMISSION *v.* WEINTRAUB ET AL. C. A. 7th Cir. [Certiorari granted, 469 U. S. 929.] Motion of the Solicitor General to permit Bruce N. Kuhlik, Esquire, to present oral argument *pro hac vice* granted.

No. 84-363. NORTHEAST BANCORP, INC., ET AL. *v.* BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM ET AL. C. A. 2d Cir. [Certiorari granted, 469 U. S. 1105.] Motions of David F. Bolger Revocable Trust, Bank of New York Co., Inc., New York State Bankers Association, and Alphonse M. D'Amato et al. for leave to file briefs as *amici curiae* granted.

No. 84-433. SCHOOL COMMITTEE OF THE TOWN OF BURLINGTON, MASSACHUSETTS, ET AL. *v.* DEPARTMENT OF EDUCATION OF MASSACHUSETTS ET AL. C. A. 1st Cir. [Certiorari granted, 469 U. S. 1071.] Motion of Developmental Disabilities Law Center et al. for leave to file a brief as *amici curiae* granted.

No. 84-679. BATEMAN EICHLER, HILL RICHARDS, INC. *v.* BERNER ET AL. C. A. 9th Cir. [Certiorari granted, 469 U. S. 1105.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. JUSTICE MARSHALL took no part in the consideration or decision of this motion.*

No. 84-870. LOUISIANA PUBLIC SERVICE COMMISSION ET AL. *v.* SOUTH CENTRAL BELL TELEPHONE CO. Appeal from C. A. 5th Cir.; and

No. 84-900. NEW ENGLAND TELEPHONE & TELEGRAPH CO. *v.* PUBLIC UTILITIES COMMISSION OF MAINE ET AL. C. A. 1st Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

Certiorari Granted

No. 84-836. VASQUEZ, WARDEN *v.* HILLERY. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 733 F. 2d 644.

No. 84-5555. HEATH *v.* ALABAMA. Sup. Ct. Ala. Motion of petitioner for leave to proceed *in forma pauperis* granted. Cer-

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*See also note, *supra*, p. 1025.

tiorari granted limited to Question II. In addition, the parties are requested to address the following question: "What is the applicability, if any, of the dual sovereignty doctrine to successive prosecutions by two different states?" Reported below: 455 So. 2d 905.

No. 84–5630. THOMAS *v.* ARN, SUPERINTENDENT, OHIO REFORMATORY FOR WOMEN. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 728 F. 2d 813.

Certiorari Denied. (See also No. 84–6049, *supra.*)

No. 82–1974. CITY OF MACON *v.* JOINER ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 699 F. 2d 1060.

No. 83–257. CITY COUNCIL OF AUGUSTA, GEORGIA *v.* ALEWINE ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 699 F. 2d 1060.

No. 84–321. ALABAMA *v.* STURDIVANT. Sup. Ct. Ala. Certiorari denied. Reported below: 460 So. 2d 1210.

No. 84–693. HARRELL *v.* UNITED STATES; and
No. 84–5748. HAWKINS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 737 F. 2d 971.

No. 84–700. WEST MICHIGAN BROADCASTING CO. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 236 U. S. App. D. C. 335, 735 F. 2d 601.

No. 84–924. SMITH *v.* RUSSELL. Sup. Ct. Fla. Certiorari denied. Reported below: 456 So. 2d 462.

No. 84–955. BELL *v.* BELL. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 393 Mass. 20, 468 N. E. 2d 859.

No. 84–961. VANCE ET AL. *v.* TENNESSEE VALLEY AUTHORITY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 738 F. 2d 1418.

No. 84–974. BATTIPAGLIA ET AL. *v.* NEW YORK STATE LIQUOR AUTHORITY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 745 F. 2d 166.

No. 84–984. National Broadcasting Co., Inc. *v.* Herman et al.; and

No. 84–1133. Herman et al. *v.* National Broadcasting Co., Inc. C. A. 7th Cir. Certiorari denied. Reported below: 744 F. 2d 604.

No. 84–1012. Haney, Administrator of the Estate of Mayes *v.* City of Louisvile, Kentucky, et al. Ct. App. Ky. Certiorari denied.

No. 84–1085. Metropolitan Life Insurance Co. *v.* Kelley. C. A. 9th Cir. Certiorari denied.

No. 84–1090. Lostal et al. *v.* Manville Corp. et al. C. A. 2d Cir. Certiorari denied. Reported below: 751 F. 2d 368.

No. 84–1106. Northern California District Council of Laborers et al. *v.* Frederick Meiswinkel, Inc. C. A. 9th Cir. Certiorari denied. Reported below: 744 F. 2d 1374.

No. 84–1114. Blair *v.* Committee on Legal Ethics of the West Virginia State Bar. Sup. Ct. App. W. Va. Certiorari denied. Reported below: —— W. Va. ——, 327 S. E. 2d 671.

No. 84–1115. Legal Services Corporation et al. *v.* East Arkansas Legal Services. C. A. D. C. Cir. Certiorari denied. Reported below: 239 U. S. App. D. C. 319, 742 F. 2d 1472.

No. 84–1118. Atkins *v.* Tennessee. Ct. Crim. App. Tenn. Certiorari denied. Reported below: 681 S. W. 2d 571.

No. 84–1119. Goldberg *v.* Sitomer, Sitomer & Porges et al. Ct. App. N. Y. Certiorari denied. Reported below: 63 N. Y. 2d 831, 472 N. E. 2d 44.

No. 84–1123. Armour & Co. *v.* Holsey et al. C. A. 4th Cir. Certiorari denied. Reported below: 743 F. 2d 199.

No. 84–1124. Para Transit Corp. et al. *v.* County of Monroe et al. Pa. Commw. Ct. Certiorari denied. Reported below: 79 Pa. Commw. 104, 468 A. 2d 548.

No. 84–1129. Conti et al. *v.* Ford Motor Co. C. A. 3d Cir. Certiorari denied. Reported below: 743 F. 2d 195.

No. 84–1158. Singer et al. *v.* Wadman et al. C. A. 10th Cir. Certiorari denied. Reported below: 745 F. 2d 606.

No. 84–1162. Burlington Northern Railroad Co. *v.* Clay. C. A. 10th Cir. Certiorari denied.

No. 84-1196. Certain-Teed Corp. *v.* Contractor Utility Sales Co., Inc. C. A. 7th Cir. Certiorari denied. Reported below: 748 F. 2d 1151.

No. 84-1203. Fischbach & Moore, Inc. *v.* United States;
No. 84-1218. Lord Electric Co., Inc. *v.* United States; and
No. 84-1229. Arbogast *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 750 F. 2d 1183.

No. 84-1247. Azarian *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 742 F. 2d 1465.

No. 84-1272. Carey *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 746 F. 2d 228.

No. 84-5692. Covington *v.* Maryland. Ct. Sp. App. Md. Certiorari denied. Reported below: 58 Md. App. 737.

No. 84-5710. Butler *v.* United States. Ct. App. D. C. Certiorari denied. Reported below: 481 A. 2d 431.

No. 84-5719. Coker *v.* Williams, Warden. C. A. 11th Cir. Certiorari denied. Reported below: 752 F. 2d 648.

No. 84-5745. Little *v.* Missouri. Sup. Ct. Mo. Certiorari denied. Reported below: 674 S. W. 2d 541.

No. 84-5772. Small *v.* Wisconsin. Ct. App. Wis. Certiorari denied. Reported below: 120 Wis. 2d 675, 355 N. W. 2d 254.

No. 84-5796. Peterson, by Chance, Next Friend *v.* City of Aurora, Colorado. Dist. Ct. Colo., Arapahoe County. Certiorari denied.

No. 84-5889. Neal *v.* Ohio. Ct. App. Ohio, Montgomery County. Certiorari denied.

No. 84-5902. Clay *v.* Texas. Ct. Crim. App. Tex. Certiorari denied. Reported below: 675 S. W. 2d 765.

No. 84-6022. Williams *v.* Parke, Warden, et al. C. A. 6th Cir. Certiorari denied. Reported below: 741 F. 2d 847.

No. 84-6023. Shivers *v.* Illinois. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 125 Ill. App. 3d 1176, 481 N. E. 2d 368.

No. 84-6024. BROWN *v.* WAINWRIGHT, DIRECTOR, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 747 F. 2d 1466.

No. 84-6031. KRUG *v.* ABEL. C. A. 7th Cir. Certiorari denied.

No. 84-6035. BALLENGEE *v.* HOLLAND, WARDEN. Sup. Ct. App. W. Va. Certiorari denied.

No. 84-6037. FAISON *v.* DAVIS, JUDGE, ET AL. C. A. 11th Cir. Certiorari denied.

No. 84-6038. STEWART *v.* BLACKBURN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 746 F. 2d 262.

No. 84-6042. BRADLEY *v.* REES, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 751 F. 2d 384.

No. 84-6044. DAY *v.* DEANDA, JUDGE, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, ET AL. C. A. 5th Cir. Certiorari denied.

No. 84-6046. MOORE *v.* PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 740 F. 2d 965.

No. 84-6047. NORRIS *v.* DAVIS, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 746 F. 2d 814.

No. 84-6056. MINNEMAN *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 466 N. E. 2d 438.

No. 84-6058. PALLETT *v.* MALHEUR COUNTY CIRCUIT COURT. Sup. Ct. Ore. Certiorari denied.

No. 84-6066. COOPER *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 58 Md. App. 736.

No. 84-6072. WESTFALL *v.* HOLLAND, WARDEN. Sup. Ct. App. W. Va. Certiorari denied.

No. 84-6126. COMBS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 751 F. 2d 387.

No. 84-6137. STEAD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 746 F. 2d 355.

No. 84–6140. Achawamethekul *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 755 F. 2d 924.

No. 84–6142. Day *v.* United States. Ct. App. D. C. Certiorari denied.

No. 84–6162. Smith *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 751 F. 2d 387.

No. 84–6163. Chua Han Mow *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 730 F. 2d 1308.

No. 84–6169. Levine *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 751 F. 2d 372.

No. 84–6177. Silva *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 745 F. 2d 840.

No. 84–6178. Smith *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 746 F. 2d 1480.

No. 84–6184. Barnard *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 751 F. 2d 391.

No. 84–6185. Greer *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 751 F. 2d 380.

No. 84–559. Peralta Shipping Corp. *v.* Smith & Johnson (Shipping) Corp. C. A. 2d Cir. Certiorari denied. Justice Brennan would grant certiorari. Reported below: 739 F. 2d 798.

Justice Blackmun, with whom Justice Marshall joins, dissenting.

The admiralty jurisdiction of the federal courts extends generally to a transaction that "'relates to ships and vessels, masters and mariners, as the agents of commerce.'" *Kossick* v. *United Fruit Co.*, 365 U. S. 731, 736 (1961), quoting 1 E. Benedict, Admiralty 131 (6th ed. 1940). Notwithstanding the broad sweep of the admiralty jurisdiction, this Court, since the time of its single-page opinion in *Minturn* v. *Maynard*, 17 How. 477 (1855), has refused to extend admiralty jurisdiction to disputes involving general agency contracts that call for "husbanding" a vessel, that is, arranging for the performance of the various services that are preliminary to maritime movement. This case presents an opportunity to address the continued vitality of this much-criticized exception to admiralty jurisdiction, an exception that has been applied inconsistently and that has created unnecessary confusion in the federal courts.

Petitioner Peralta is the general agent in the United States for an operator of several oceangoing cargo vessels. In 1979, it executed a sub-agency agreement with respondent Smith & Johnson whereby it appointed respondent as "Gulf agents" responsible for arranging services for the principal's vessels calling on ports between Brownsville, Tex., and Tampa, Fla. Under the agreement, respondent promised to act as the "husbanding agen[t]" by providing for services such as

> "arranging for entrance and clearance of vessels at the Custom House, execution of all Custom House documents incidental thereto, arranging for fuel, water, provisions, emergency repairs, port charges and other similar matters, and for stevedoring, storage and other cargo handling; arranging for tugs,"

and a number of other services directly involved with the operation of vessels while at port preparing for departure. See 739 F. 2d 798, 799 (CA2 1984).

Two years after the agreement was signed, petitioner commenced this action in the United States District Court for the Southern District of New York. Relying on the court's admiralty jurisdiction, petitioner alleged that respondent had breached the agency agreement. It sought an accounting and recovery of money said to have been wrongfully retained by respondent. In particular, Peralta sought to recover freight collected on vessels and not turned over to it, and money advanced by petitioner to pay suppliers but diverted by respondent. Addressing cross-motions for summary judgment, the District Court on its own questioned its subject-matter jurisdiction. It concluded that the sub-agency "husbanding" contract under which respondent acted as local port agent for the principal was not a maritime contract within the court's admiralty jurisdiction. It therefore dismissed the complaint pursuant to Federal Rule of Civil Procedure 12(h)(3).

The Court of Appeals affirmed, 739 F. 2d 798 (CA2 1984), holding that it was constrained by *Minturn, supra,* and those Second Circuit cases that had faithfully adhered to the rule established in *Minturn* that admiralty jurisdiction does not extend to general agency or sub-agency "husbanding" contracts. 739 F. 2d, at

802–803. The court declined to narrow the scope of *Minturn* by finding an exception for husbanding sub-agency contracts that provide services necessary for the continuing voyage, rather than services preliminary to the voyage, though it recognized that the Ninth Circuit had taken this approach in *Hinkins Steamship Agency* v. *Freighters, Inc.*, 351 F. Supp. 373 (ND Cal. 1972), aff'd, 498 F. 2d 411 (1974). See 739 F. 2d, at 803–804. Finally, the court recognized that the *Minturn* rule made little sense in light of the policy concerns underlying the grant of admiralty jurisdiction—the federal interest in promoting and protecting the maritime industry. See 739 F. 2d, at 804. Though it "would welcome" a decision from this Court overruling *Minturn*, because agency and sub-agency agreements are clearly an integral part of maritime commerce, and thus should be included within the admiralty jurisdiction, it recognized that it was without authority to issue such a decision, and that "'only the Supreme Court should do it,'" quoting *Admiral Oriental Line* v. *Atlantic Gulf & Oriental S.S. Co.*, 88 F. 2d 26, 27 (CA2 1937). See 739 F. 2d, at 804.

"The boundaries of admiralty jurisdiction over contracts—as opposed to torts or crimes—being conceptual rather than spatial, have always been difficult to draw." *Kossick* v. *United Fruit Co.*, 365 U. S., at 735. Generally, however, contract actions that relate to maritime service or maritime transactions have been understood to fall within the admiralty jurisdiction of the federal courts. Though the need for bright-line rules in this area is evident, the line drawn in *Minturn* has been criticized widely and severely because it excludes so much that obviously concerns maritime transactions. Thus G. Gilmore & C. Black, Law of Admiralty 28, and n. 94b (2d ed. 1975), regard the rule as one of "dubious defensibility," and have predicted that, when this Court reaches the issue, it will hold that general agency and other vessel-management agreements fall within the admiralty jurisdiction, and will overrule *Minturn* and its progeny. See also 7A J. Moore & A. Pelaez, Moore's Federal Practice ¶.250, p. 3006 (1983) ("Quite clearly, such agreements are an integral part of, and in furtherance of, maritime commerce and, consequently, should be cognizable within the admiralty jurisdiction of the district courts").

Not only is the *Minturn* rule of dubious validity, but in efforts to narrow its application, the Courts of Appeals have developed a number of equally questionable exceptions to the rule that have created confusion and disagreement. Thus, for purposes of determining admiralty jurisdiction, the Ninth Circuit would distinguish among maritime agency contracts based on a series of factors, including the degree of importance of the services rendered by the agent, the extent of supervision of performance, and the existence of a continuing relationship between agent and principal. *Hinkins, supra.* The Fifth Circuit appears to have taken the position that *Minturn* applies only to an action for an accounting. See *Hadjipateras* v. *Pacifica, S.A.*, 290 F. 2d 697, 704, and n. 15 (1961).* The Second Circuit in the present case recognized that its decision was in conflict with these decisions of the Fifth and Ninth Circuits. See 739 F. 2d, at 803, and n. 4.

The conflict between the approaches to this question taken by the Courts of Appeals is reason enough to grant this petition, for uniformity and predictability in the maritime industry were the ends sought in the Constitution when federal-court maritime jurisdiction was created in the first instance. A substantial argument has been advanced that the rule established in *Minturn* improperly excludes from federal maritime juridiction disputes that directly concern the business of maritime commerce. In light of the strength of that argument, of the confusion and conflict in the courts, and of the need for a uniform rule, I would grant this petition.

I therefore dissent.

No. 84–748. GREEN *v.* TEXAS. Ct. Crim. App. Tex.;
No. 84–5774. WILCHER *v.* MISSISSIPPI. Sup. Ct. Miss.;
No. 84–5856. GRANDISON *v.* MARYLAND. Ct. App. Md.;
No. 84–5877. KNAPP *v.* ARIZONA. Super. Ct. Ariz., Maricopa County;
No. 84–6041. SAMPLE *v.* TENNESSEE. Sup. Ct. Tenn.;
No. 84–6093. MCKAY *v.* TENNESSEE. Sup. Ct. Tenn.;
No. 84–6043. JACKSON *v.* ALABAMA. Sup. Ct. Ala.; and
No. 84–6091. JOHNS *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: No. 84–748, 682 S. W. 2d 271;

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*"[T]he distinctions made by the courts in dealing with agreements with brokers and agents seem contrived and not based upon sound reason or policy." 7A J. Moore & A. Pelaez, Moore's Federal Practice ¶.250, p. 3003 (1983).

No. 84–5774, 455 So. 2d 727; No. 84–5856, 301 Md. 45, 481 A. 2d 1135; Nos. 84–6041 and 84–6093, 680 S. W. 2d 447; No. 84–6043, 459 So. 2d 969; No. 84–6091, 679 S. W. 2d 253.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 84–762. REED ET AL. *v.* SLAKAN. C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 737 F. 2d 368.

No. 84–1178. FLORIDA *v.* FASENMYER. Sup. Ct. Fla. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 457 So. 2d 1361.

No. 84–763. SAN FILIPPO *v.* UNITED STATES TRUST COMPANY OF NEW YORK ET AL.; and

No. 84–1018. UNITED STATES TRUST COMPANY OF NEW YORK ET AL. *v.* SAN FILIPPO ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 737 F. 2d 246.

JUSTICE WHITE, dissenting.

Augustin San Filippo sued United States Trust Company and two of its officers under 42 U. S. C. § 1983 for malicious prosecution. San Filippo alleged that the U. S. Trust officers had conspired with a New York County Assistant District Attorney to present false testimony to a grand jury that was investigating San Filippo's alleged fraud in obtaining loans from U. S. Trust for two of his clients. Although the grand jury had returned an indictment against San Filippo, a jury had subsequently acquitted him of all charges.

The defendants asserted several affirmative defenses in the United States District Court for the Southern District of New York, including their absolute immunity from § 1983 liability for their grand jury testimony or prior discussions with the prosecutor. Partly on the basis of this claimed immunity, they sought a protective order against further discovery and also moved for dismissal or summary judgment. These motions were denied by the

District Court, and the defendants appealed. The United States Court of Appeals for the Second Circuit held that the denials of these motions were properly before it under the "collateral final order" doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, 546 (1949), at least insofar as they were premised on a rejection of the defendants' absolute immunity defense. 737 F. 2d 246, 254 (1984). On the merits, the court reasoned that the defendants were entitled to absolute immunity for their actual testimony before the grand jury, citing *Briscoe* v. *LaHue*, 460 U. S. 325 (1983), but not for any extrajudicial conspiracy between themselves and the prosecutor leading to the giving of the allegedly false testimony. The court then went on, however, to hold that San Filippo's "completely unsubstantiated allegations of conspiracy" were insufficient to state a valid claim for relief under § 1983. Recognizing that this ground for relief did not "in its own right merit interlocutory review under *Cohen*," the court held that it had jurisdiction to consider the issue "under the doctrine of pendent appellate jurisdiction," and determined to exercise that jurisdiction in this case in view of "the waste of judicial resources" were the suit to go forward on remand. 737 F. 2d, at 255–256.

In reaching that holding, the Court of Appeals failed to mention our decision in *Abney* v. *United States*, 431 U. S. 651 (1977). In that case, we held that a court of appeals may exercise jurisdiction under *Cohen* over an appeal from a pretrial order denying a motion to dismiss an indictment on double jeopardy grounds. We further concluded, however, that this jurisdiction did not extend to "other claims presented to, and rejected by, the district court in passing on the accused's motion to dismiss." *Id.*, at 663. We specifically cautioned that "such claims are appealable if, and only if, they too fall within *Cohen*'s collateral-order exception to the final-judgment rule." Any other rule, we reasoned, would encourage the assertion of frivolous but appealable claims in order to obtain premature appellate review of otherwise unappealable "pendent" claims.

The decision below is clearly in tension with our rationale in *Abney*. Moreover, it is in direct conflict with the holding of the Court of Appeals for the Third Circuit in *Akerly* v. *Red Barn System, Inc.*, 551 F. 2d 539, 542–543 (1977). In *Akerly*—like this, a civil case—the Third Circuit concluded that a District Court's refusal to disqualify counsel was a "collateral order" under 28 U. S. C. § 1291, and that it therefore had appellate jurisdiction to rule on the issue. The court refused, however, to extend its jurisdiction to the District Court's denial of a motion to dismiss. Recognizing that it would have asserted jurisdiction over this separate issue if the appeal had arisen under 28 U. S. C. § 1292(b), the Third Circuit reasoned that the governing principle behind the collateral-order doctrine was not judicial efficiency, but the separability of the order from the remainder of the case. Furthermore, the collateral-order doctrine was to be sparingly applied. 551 F. 2d, at 543. See also *Forsyth* v. *Kleindienst*, 599 F. 2d 1203, 1209 (CA3 1979). But see *Metlin* v. *Palastra*, 729 F. 2d 353 (CA5 1984); *Dellums* v. *Powell*, 212 U. S. App. D. C. 403, 405, n. 6, 660 F. 2d 802, 804, n. 6 (1981).

These cases betray confusion among the lower courts concerning the proper application of *Abney* to appeals arising under the *Cohen* doctrine. I would grant certiorari to clarify the law concerning this important and frequently recurring question.*

No. 84–812. GRAND TRUNK WESTERN RAILROAD *v.* MULAY PLASTICS, INC. C. A. 7th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 742 F. 2d 369.

No. 84–1128. DIGILIO *v.* NEW JERSEY. Super. Ct. N. J., Chancery Div. Certiorari denied. JUSTICE BRENNAN took no part in the consideration or decision of this petition.†

No. 84–5811. GACY *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 103 Ill. 2d 1, 468 N. E. 2d 1171.

JUSTICE BRENNAN, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would grant certiorari and vacate the death sentence in this case.

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*United States Trust and its officers have filed a conditional cross-petition, No. 84–1018. I would also grant certiorari on the cross-petition, limited to the first question presented—the only question actually resolved by the Court of Appeals. That question is whether the courts below erred in rejecting absolute immunity for the defendants for their off-the-stand contacts with the Assistant District Attorney, leading to their allegedly false testimony before the grand jury.

†See also note, *supra*, p. 1025.

JUSTICE MARSHALL, dissenting.

Adhering to my view that the death penalty is under all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments, I would vacate the judgment of the Supreme Court of Illinois insofar as that judgment leaves petitioner's death sentence undisturbed. *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting). However, even if I believed that the death penalty could constitutionally be imposed under certain circumstances, I would grant certiorari and vacate the death sentence imposed here.

The petitioner challenges two aspects of the Illinois capital sentencing scheme, each of which poses a serious constitutional question. First, after a sentencing jury has found one or more aggravating factors, the statute imposes on the defendant the burden of adducing mitigating evidence "sufficient to preclude the imposition" of the death penalty. Ill. Rev. Stat., ch. 38, ¶9-1(g) (Supp. 1984). The statute thereby places on the defendant the burden of proving that death is not appropriate in his particular case. As I have stated before in reference to this statute, I do not read our precedents as permitting a defendant to bear the risk of persuading a jury that his life should be spared. See *Jones* v. *Illinois*, 464 U. S. 920 (1983) (MARSHALL, J., dissenting from denial of certiorari).

Second, the Illinois statute places the decision on whether to convene a death hearing solely in the hands of the individual Illinois prosecutor. Ill. Rev. Stat., ch. 38, ¶9-1(d) (Supp. 1984). As a result, it vests in the prosecutor the unlimited and unguided discretion to select, among potential capital defendants, those who may be subject to the death penalty. The statute thereby introduces into the sentencing phase of trial—a phase in which our precedents require that discretion be carefully guided—an element of completely unbridled discretion, and it invites irrational and arbitrary decisionmaking. See *Eddmonds* v. *Illinois*, 469 U. S. 894, 895 (1984) (MARSHALL, J., dissenting from denial of certiorari). Because I continue to believe that this Court should consider both of these issues, I respectfully dissent from the Court's denial of certiorari in this case.

No. 84-5966. SUMMIT *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari. Reported below: 454 So. 2d 1100.

Rehearing Denied

No. 83–6865. VINCENT *v.* LOUISIANA, 469 U. S. 1166;

No. 84–269. BLOOM *v.* UNITED STATES, 469 U. S. 1157;

No. 84–788. LANDERS *v.* STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. ET AL., 469 U. S. 1159;

No. 84–5454. STAPLES *v.* TOWNE ET AL., 469 U. S. 1162;

No. 84–5749. BRIDGES ET AL. *v.* PHILLIPS PETROLEUM CO., 469 U. S. 1163;

No. 84–5806. DAY *v.* SUPREME COURT OF TEXAS ET AL., 469 U. S. 1194;

No. 84–5828. ROCCO *v.* CENTRAL MUNICIPAL COURT, COUNTY OF ORANGE, 469 U. S. 1195; and

No. 84–5891. SLATER *v.* UNITED STATES, 469 U. S. 1195. Petitions for rehearing denied.

MARCH 5, 1985

Certiorari Denied

No. 84–6325 (A–666). WITT *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Application for stay of execution of sentence of death, presented to JUSTICE REHNQUIST, and by him referred to the Court, denied. Certiorari denied. JUSTICE STEVENS would grant the application. JUSTICE POWELL took no part in the consideration or decision of this application and this petition. Reported below: 755 F. 2d 1396.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting), I would grant Witt's application for a stay of execution. But even if I thought otherwise, I would stay this execution because Witt's petition raises an issue—crucial to the administration of capital punishment in this country—on which there exists a split of authority among the Courts of Appeals. This Court is certain to grant certiorari in the immediate future to resolve this issue, and our resolution will govern the question whether Witt's death sentence is constitutional. Under these circumstances, a denial of Witt's application for a stay is manifestly unjust.

I

Witt was convicted of murder and sentenced to death. After exhausting Florida's postconviction remedies, he sought federal habeas corpus relief. The United States Court of Appeals for the Eleventh Circuit upheld Witt's conviction but reversed his sentence on the basis of *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968). *Witt* v. *Wainwright*, 714 F. 2d 1069 (1983). This Court reversed and remanded. *Wainwright* v. *Witt*, 469 U. S. 412 (1985). A second federal habeas petition was filed in Federal District Court on February 26, 1985, while Witt was simultaneously exhausting state remedies. On March 1, 1985, the District Court denied habeas relief and an application for stay of execution pending appeal. On March 4, the Court of Appeals affirmed the denial of habeas relief and denied an application for a stay of execution pending disposition of a petition for certiorari to this Court. On the same day Witt petitioned this Court for certiorari and applied for a stay of execution pending disposition of that petition. Barring a stay by this Court, Witt will be executed at 7 a. m. on March 6, 1985.

Witt alleges that his Sixth and Fourteenth Amendment rights were violated when the State submitted the general venire to a process of "death-qualification." The crux of Witt's argument is that the currently permissible, but constitutionally circumscribed, *voir dire* process in capital cases of excluding jurors opposed to the death penalty, see *Wainwright* v. *Witt*, *supra*, has the unconstitutional effect of rendering juries more predisposed to find a defendant guilty than would a jury from which those opposed to the death penalty had not been excused. This argument implicates both the right to an impartial jury and the right to a jury from which an identifiable segment of the community has not been excluded. See, *e. g., Taylor* v. *Louisiana*, 419 U. S. 522, 538 (1975).

Witherspoon explicitly left open the question that Witt raises. The Court declined to address the question primarily because the empirical data then available were too fragmentary to permit conclusive resolution of the question whether "death-qualified" juries are unconstitutionally prone to convict. We made quite clear, however, that a sufficient empirical showing to that effect would raise grave constitutional questions:

> "[T]he question would then arise whether the State's interest in submitting the penalty issue to a jury capable of imposing capital punishment may be vindicated at the expense of the

> defendant's interest in a completely fair determination of guilt or innocence—given the possibility of accommodating both interests by means of a bifurcated trial, using one jury to decide guilt and another to fix punishment." 391 U. S., at 520, n. 18.

See also *Bumper* v. *North Carolina,* 391 U. S. 543, 545 (1968). Our recent decision in *Wainwright* v. *Witt, supra,* in no way forecloses this issue, and may have made its immediate resolution imperative. See *id.*, at 460, n. 11 (BRENNAN, J., dissenting).

The District Court in this case ruled on the merits of Witt's claim and rejected the argument that the "death-qualified" jury is unconstitutionally prone to convict. Tr. 17. In doing so, the court followed a recent en banc ruling of the the Eleventh Circuit rejecting the identical claim. See *McCleskey* v. *Kemp,* 753 F. 2d 877 (1985). To support rejection of the claim the Eleventh Circuit in *McCleskey* specifically relied on *Spinkellink* v. *Wainwright,* 578 F. 2d 582, 583–596 (CA5 1978), cert. denied, 440 U. S. 976 (1979). In *Spinkellink,* the Fifth Circuit had held that, irrespective of empirical data showing that "death-qualified" juries are biased in favor of the prosecution, the process of "death-qualification" of capital jurors violates no constitutional rights of a capital defendant because the proposition that "a death-qualified jury is more likely to convict than a nondeath-qualified jury does not demonstrate *which* jury is impartial. It indicates only that a death-qualified jury might favor the prosecution and that a nondeath-qualified jury might favor the defendant." 578 F. 2d, at 593–594 (emphasis added). The Fourth Circuit has in recent months also relied on the Fifth Circuit's analysis in *Spinkellink* to reject a challenge identical to the one presented in this case. See *Keeten* v. *Garrison,* 742 F. 2d 129 (1984).

A recent en banc decision of the Eighth Circuit directly conflicts with this established Fourth, Fifth, and Eleventh Circuit law. See *Grigsby* v. *Mabry,* 758 F. 2d 226 (1985). After carefully scrutinizing a large body of empirical evidence on which the District Court had relied in making the factual finding that "death-qualified" juries are more prone to convict, the Eighth Circuit ruled that a conviction rendered by such a jury violates the capital defendant's Sixth and Fourteenth Amendment rights to an impartial jury. *Id.*, at 241–242 ("The issue is not whether a jury would be biased one way or the other, but whether an impartial jury can exist when a distinct group in the community is excluded by systematically challenging them for cause"). In reaching this conclusion, the Eighth Circuit acknowledged and explained its rejection of the analysis that led the Fifth Circuit in *Spinkellink*, the Fourth Circuit in *Keeten*, and the Eleventh Circuit in *McCleskey* to a contrary result. *Grigsby* v. *Mabry*, *supra*, at 238–242.

This Court will certainly grant certiorari to resolve this issue in the immediate future because it presents a clear split in the Courts of Appeals on an issue of constitutional law whose importance to the administration of the States' criminal justice systems is undoubted. In light of the certainty that this Court will soon address the issue and the uncertainty as to its proper resolution, the State of Florida's effort to execute Witt should be stayed pending our disposition of the issue.

II

Despite the overwhelming public importance of this issue, the State of Florida, raising a procedural barrier to Witt's claim, would allow Witt to die with the issue still hanging in the balance. The State argues that Witt should not be allowed to have the issue aired because he did not present it in an earlier federal habeas petition; on the basis of this argument, the Eleventh Circuit closed its doors to Witt's substantial constitutional claim. Abuse of the writ was found because in Witt's first federal habeas petition, filed on May 5, 1980, he did not raise his death-qualified jury claim—a claim accepted for the first time by any court on August 5, 1983. See *Grigsby* v. *Mabry*, 569 F. Supp. 1273 (ED Ark 1983), aff'd, 758 F. 2d 226 (CA8 1985) (en banc). Witt's claim raises questions going to the heart of the jury system by which he was convicted, and to bar him from raising it merely because his counsel either did not know of the claim in 1980 or recognized the futility of raising it at that time would cast serious doubt on the willingness of this Court to ensure that executions are carried out in compliance with the Constitution.

This Court has had little occasion to address the abuse-of-the-writ principles now codified in 28 U. S. C. § 2244(b) and in 28 U. S. C. § 2254 Rule 9. In 1948, shortly before § 2244(b) was passed, the Court in *Price* v. *Johnston*, 334 U. S. 266, 291 (1948), overturned a District Court's dismissal without a hearing of a fourth habeas petition that presented issues not previously adjudicated. Discussing general equitable principles governing issuance of the writ, the Court noted that "[t]he primary purpose of a habeas corpus proceeding is to make certain that a man is not unjustly imprisoned," and that the mere fact that petitioner had filed three previous petitions was no reason to refuse to reach the merits of his claim. In *Sanders* v. *United States*, 373 U. S. 1 (1963), the Court undertook its only full explication of abuse-of-the-writ principles. Citing the deliberate bypass standard of *Fay* v. *Noia*, 372 U. S. 391 (1963), the Court in *Sanders* emphasized that previously unadjudicated claims must be decided on the merits unless the petitioner has made a conscious decision deliberately to withhold them, is pursuing "needless piecemeal litigation," or the claims are raised only to "vex, harass, or delay." 373 U. S., at 18. To illustrate the proper application of this principle, the Court discussed *Wong Doo* v. *United States*, 265 U. S. 239 (1924), in which the petitioner had raised two claims in a first petition but offered no evidence on one of those claims. An attempt to reassert that claim in a second petition was held an abuse of the writ, for the petitioner was found to have deliberately abandoned the claim in the earlier proceeding.

Other than these isolated instances, the Court has had little occasion in full opinions to elaborate upon the contours of the abuse-of-the-writ doctrine. Instead, the doctrine develops *sub rosa* when this Court refuses to stay executions or to consider substantive claims raised in certiorari petitions that arise from second or later habeas petitions. That alone should be reason to pause before declining, without plenary consideration, to reach the merits of the major issue in current death-penalty law that this stay application and certiorari petition raise; lower courts, as well as the public, are entitled to guidance as to what standards this Court is employing when it refuses to reach the merits of what are clearly substantial issues in the administration of the death penalty. Surely the mere fact that this is a second habeas petition is not in and of itself enough to bar consideration of the merits of Witt's claim. See *Woodard* v. *Hutchins*, 464 U. S. 377, 383 (1984) (WHITE and STEVENS, JJ., dissenting).

Moreover, while the Court has abandoned *Fay*'s deliberate bypass standard in some contexts and required petitioners to show cause and prejudice for their delay in presenting issues, see *Wainwright* v. *Sykes*, 433 U. S. 72 (1977), it is clear that the deliberate bypass standard of *Sanders* still governs dismissal of successive habeas petitions. First, in enacting Rule 9(b), Congress explicitly adopted the abuse-of-the-writ standard announced in *Sanders*. See *Rose* v. *Lundy*, 455 U. S. 509, 521 (1982). Second, Congress explicitly rejected a "cause and prejudice" test in this context; although a proposed draft of the Rule would have allowed dismissal when the failure to raise a claim earlier was "not excusable," see H. R. Rep. No. 94–1471, p. 8 (1976), Congress amended the proposed Rule for fear that "the 'not excusable' language created a new and undefined standard *that gave a judge too broad a discretion to dismiss a second or successive petition.*" *Id.*, at 5 (emphasis added). Instead, a less stringent standard—that of *Sanders*—was adopted. Under that standard, dismissal is allowed only when a second petition "constitute[s] an abuse of the writ." *Id.*, at 5, 8.

Thus, a successive petitioner is not required to demonstrate that he was *unable* to raise the claim earlier. Instead, the petitioner need show only that the claim was not deliberately withheld for the purpose of abusing the process in some way. Witt cannot be accused of such abuse. First, unlike *Wong Doo*, Witt did not present this claim in his first petition and then abandon it. See also *Antone* v. *Dugger*, 465 U. S. 200 (1984). Second, Witt can hardly be said to be engaging in "*needless* piecemeal litigation," *Sanders*, *supra*, at 18 (emphasis added); his only failing was to raise his claim at a time when it was clear that it was foreclosed in Florida, see, *e. g.*, *Riley* v. *State*, 366 So. 2d 19 (Fla. 1978), and in the Eleventh Circuit, see *Spinkellink* v. *Wainwright*, 578 F. 2d 582 (CA5 1978), cert. denied, 440 U. S. 976 (1979), and when this Court had refused to entertain the claim many times. Were the rule otherwise, as it seems to be becoming, defense counsel in every criminal case would have to include in a first federal habeas petition a laundry list of potentially meritorious but clearly rejected constitutional claims in order to preserve them should the law later change. Rather than promoting efficiency, such a rule would further clog the courts and confound lower court judges. Third, Witt's petition is not one "whose only purpose is to vex, harass, or delay." 373 U. S., at 18. Witt has raised a substantial claim going to the validity of his conviction. Finally, it is clear that, were this Court upon plenary consideration to invalidate death-qualified juries, such a holding would constitute an intervening change in law sufficient to allow Witt then to have his claim adjudicated on the merits. Surely Witt's fate should not rest on the fortuity of his execution having been scheduled before, rather than after, this Court's consideration of the Eighth Circuit's decision.

Perhaps of even greater importance, *Sanders* left no doubt that a claim raised for the first time in a second or later habeas petition could be considered if "the ends of justice" would thereby be served. See *id.*, at 17. "Even as to [a successive] application, the federal judge clearly has the power—and, if the ends of justice demand, the duty—to reach the merits." *Id.*, at 18–19. Yet I fail to see how this standard can be applied in any meaningful way before we address the merits of the underlying death-qualified juror claim that the Court must soon face. Witt's claim strikes at the heart of every premise upon which the legitimacy of his conviction rests. A great deal of empirical work has been devoted to exploring this claim, and the evidence supporting it is strong enough to have convinced the en banc Eighth Circuit, and two District Courts, that the claim is sound. Until we have the issue before us for plenary consideration, examine the underlying evidence, and reach some decision on both the merits of the claim and the nature and scope of any constitutional defect that might exist, I simply cannot understand how the "ends of justice" test can be applied to determine whether Witt's claim should be procedurally barred. "The availability of habeas corpus relief should depend primarily on the character of the alleged constitutional violation and not on the procedural history underlying the claim." *Rose* v. *Lundy*, *supra*, at 547–548 (STEVENS, J., dissenting). To apply the procedural bar in advance of full consideration of this central issue is to turn the Great Writ on its head.

III

Witt will not be the first person whose execution this Court has sanctioned notwithstanding a claim that his conviction by a "death-qualified" jury violated the Sixth and Fourteenth Amendments. See, *e. g.*, *Knighton* v. *Maggio*, 468 U. S. 1229 (1984) (BRENNAN, J., dissenting); *Woodard* v. *Hutchins*, *supra*, at 382 (BRENNAN, J., dissenting). Nor will he be the first person whose execution this Court has sanctioned "while the constitutionality of his sentence is in doubt." See, *e. g.*, *Stephens* v. *Kemp*, 469 U. S. 1098, 1099 (1984) (BRENNAN, J., dissenting); *Green* v. *Zant*, 469 U. S. 1143, 1144 (1985) (BRENNAN, J., dissenting). The responsibility to decide profoundly difficult and divisive legal questions is not a comfortable one. All too often, judges seek to avoid this responsibility by hiding behind unexplained and unexplainable procedural "rules" that purport to allow cases to be disposed of without confronting their merits. Every Member of this Court knows that certiorari must be granted in the immediate future to resolve the issue that Witt has raised in his petition for certiorari. Our refusal to grant his stay application pending resolution of the issue unmasks the hollowness of this Court's purported commitment to unique procedural safeguards against arbitrariness "'on a matter so grave as the determination of whether a human life should be taken or spared.'" *Zant* v. *Stephens*, 462 U. S. 862, 874 (1983) (quoting *Gregg* v. *Georgia*, 428 U. S. 153, 189 (1976)); see also *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978) (BURGER, C. J.).

I dissent.

Rehearing Denied

No. 84–6325 (A–666). WITT *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., immediately *supra*. Petition for rehearing of denial of certiorari and of the order denying a stay of execution of sentence of death denied. JUSTICE POWELL took no part in the consideration or decision of this petition.

MARCH 18, 1985*

Appeals Dismissed

No. 84–1168. NASH *v.* CITY OF SANTA MONICA ET AL. Appeal from Sup. Ct. Cal. dismissed for want of substantial federal question. Reported below: 37 Cal. 3d 97, 688 P. 2d 894.

No. 84–6081. JOHNSON *v.* NEW JERSEY. Appeal from Sup. Ct. N. J. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 99 N. J. 166, 491 A. 2d 676.

No. 84–6227. MANKO *v.* UNITED STATES. Appeal from C. A. 8th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 754 F. 2d 378.

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*JUSTICE POWELL took no part in the consideration or decision of the orders announced on this date.

Certiorari Granted—Vacated and Remanded

No. 84–1089. NOVICKY *v.* SYNTEX OPHTHALMICS, INC., ET AL. C. A. Fed. Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Marrese* v. *American Academy of Orthopaedic Surgeons, ante*, p. 373. Reported below: 745 F. 2d 1423.

Certiorari Granted—Reversed. (See No. 84–690, *ante*, p. 522.)

Miscellaneous Orders

No. — — ——. LIFE FOR GOD'S STRAY ANIMALS, INC., ET AL. *v.* NEW NORTH ROCKDALE COUNTY HOMEOWNERS ASSN., INC., ET AL. Motion to direct the Clerk to file a petition for writ of certiorari out of time denied.

No. D–478. IN RE DISBARMENT OF HAILEY. It is ordered that Anna Cotton Hailey, of Elwood, Ind., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring her to show cause why she should not be disbarred from the practice of law in this Court.

No. D–482. IN RE DISBARMENT OF BRUNWIN. It is ordered that Thomas Miles Brunwin, of Arcadia, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–483. IN RE DISBARMENT OF BOND. It is ordered that Clifford Jackson Bond III, of Winston-Salem, N. C., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 83–1925. HILLSBOROUGH COUNTY, FLORIDA, ET AL. *v.* AUTOMATED MEDICAL LABORATORIES, INC. C. A. 11th Cir. [Probable jurisdiction noted, 469 U. S. 1156.] Motion of American Blood Resources Association for leave to participate in oral argument as *amicus curiae* and for divided argument granted. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 84–363. NORTHEAST BANCORP, INC., ET AL. *v.* BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM ET AL. C. A. 2d Cir. [Certiorari granted, 469 U. S. 1105.] Motion of Frank L.

Morsani for leave to file a brief as *amicus curiae* granted. Motion of respondents Bank of New England Corp. et al. for divided argument granted. Motion of petitioners Northeast Bancorp, Inc., et al. for divided argument denied.

No. 84–822. AMERICAN NATIONAL BANK & TRUST COMPANY OF CHICAGO ET AL. *v.* HAROCO, INC., ET AL. C. A. 7th Cir. [Certiorari granted, 469 U. S. 1157.] Motion of American Bankers Association for leave to file a brief as *amicus curiae* granted.

No. 84–835. NEW JERSEY DEPARTMENT OF CORRECTIONS *v.* NASH; and
No. 84–776. CARCHMAN, MERCER COUNTY PROSECUTOR *v.* NASH. C. A. 3d Cir. [Certiorari granted, 469 U. S. 1157.] Motion of petitioners for divided argument denied.

No. 84–849. KENTUCKY, DBA BUREAU OF STATE POLICE *v.* GRAHAM ET AL. C. A. 6th Cir. [Certiorari granted, 469 U. S. 1156.] Motion of National League of Cities et al. for leave to file a brief as *amici curiae* granted.

No. 84–861. NATIONAL LABOR RELATIONS BOARD *v.* INTERNATIONAL LONGSHOREMEN'S ASSN., AFL–CIO, ET AL. C. A. 4th Cir. [Certiorari granted, 469 U. S. 1188.] Motions of Delta Steamship Lines, Inc., and Chamber of Commerce of the United States of America for leave to file briefs as *amici curiae* granted.

No. 84–902. WARDAIR CANADA INC. *v.* FLORIDA DEPARTMENT OF REVENUE;
No. 84–921. NORTHEASTERN INTERNATIONAL AIRWAYS, INC., ET AL. *v.* FLORIDA DEPARTMENT OF REVENUE;
No. 84–922. LINEAS AEREAS COSTARRICENSES, S.A., ET AL. *v.* FLORIDA DEPARTMENT OF REVENUE;
No. 84–926. EASTERN AIRLINES INC. *v.* FLORIDA DEPARTMENT OF REVENUE;
No. 84–929. DELTA AIR LINES, INC. *v.* FLORIDA DEPARTMENT OF REVENUE; and
No. 84–1041. AIR JAMAICA LTD. ET AL. *v.* FLORIDA DEPARTMENT OF REVENUE. Appeals from Sup. Ct. Fla. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 84–1023. UNITED STATES *v.* ROJAS-CONTRERAS. C. A. 9th Cir. [Certiorari granted, 469 U. S. 1207.] Motion for appointment of counsel granted, and it is ordered that Judy Clare Clarke, of San Diego, Cal., be appointed to serve as counsel for respondent in this case.

No. 84–5108. LIPAROTA *v.* UNITED STATES. C. A. 7th Cir. [Certiorari granted, 469 U. S. 930.] Motion of the Solicitor General to permit Charles Rothfeld to present oral argument *pro hac vice* granted.

No. 84–6158. FERRARA *v.* BECTON, DICKINSON & CO. ET AL. C. A. Fed. Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until April 8, 1985, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 84–5543. IN RE JOHNSON. C. A. 3d Cir. Petition for writ of common-law certiorari denied.

No. 84–1282. IN RE MURGO. Petition for writ of mandamus and/or prohibition denied.

No. 84–1312. IN RE KACZMAREK. Petition for writ of prohibition denied.

Certiorari Granted

No. 84–1103. HILL *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari granted. Reported below: 764 F. 2d 1279.

Certiorari Denied. (See also Nos. 84–6081, 84–6227, and 84–5543, *supra.*)

No. 83–2125. MCMAHON, DIRECTOR, DEPARTMENT OF SOCIAL SERVICES OF CALIFORNIA *v.* VAESSEN ET AL. Sup. Ct. Cal. Certiorari denied. Reported below: 35 Cal. 3d 749, 677 P. 2d 1183.

No. 83–2165. JONES ET AL. *v.* PETIT, COMMISSIONER, MAINE DEPARTMENT OF HUMAN SERVICES. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 473 A. 2d 879.

No. 83-6168. James *v.* Cohen, Secretary of the Pennsylvania Department of Public Welfare. C. A. 3d Cir. Certiorari denied. Reported below: 715 F. 2d 794.

No. 83-6269. Bell *v.* Massinga, Secretary, Maryland Department of Human Resources, et al. C. A. 4th Cir. Certiorari denied. Reported below: 721 F. 2d 131.

No. 83-6769. Dickenson et al. *v.* Petit, Commissioner, Maine Department of Human Services, et al. C. A. 1st Cir. Certiorari denied. Reported below: 728 F. 2d 23.

No. 83-6870. Matlock *v.* Rose, Warden. C. A. 6th Cir. Certiorari denied. Reported below: 731 F. 2d 1236.

No. 84-444. Connor et al. *v.* Aerovox Inc. et al. C. A. 1st Cir. Certiorari denied. Reported below: 730 F. 2d 835.

No. 84-626. McGaffin *v.* Roberts. Sup. Ct. Conn. Certiorari denied. Reported below: 193 Conn. 393, 479 A. 2d 176.

No. 84-770. Save Mart of Modesto, Inc. *v.* United Food & Commercial Workers Union, Local 126. C. A. 9th Cir. Certiorari denied. Reported below: 745 F. 2d 68.

No. 84-783. Murray *v.* Gardner, Special Agent, Federal Bureau of Investigation, et al. C. A. D. C. Cir. Certiorari denied. Reported below: 239 U. S. App. D. C. 212, 741 F. 2d 434.

No. 84-798. McLean *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 738 F. 2d 655.

No. 84-850. Vitello *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 745 F. 2d 44.

No. 84-852. Ernst & Whinney et al. *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 735 F. 2d 1296.

No. 84-853. Asherman *v.* Connecticut. Sup. Ct. Conn. Certiorari denied. Reported below: 193 Conn. 695, 478 A. 2d 227.

No. 84-855. Basham et al. *v.* Kentucky. Sup. Ct. Ky. Certiorari denied. Reported below: 675 S. W. 2d 376.

No. 84–858. Tarter et al. *v.* Raybuck et al. C. A. 6th Cir. Certiorari denied. Reported below: 742 F. 2d 977.

No. 84–917. Hansen, Individually and as Executrix of the Estate of Hansen *v.* Johns-Manville Sales Corp. et al.; and

No. 84–1131. Johns-Manville Sales Corp. et al. *v.* Hansen et al. C. A. 5th Cir. Certiorari denied. Reported below: 734 F. 2d 1036.

No. 84–941. Oklahoma *v.* Eddings. Ct. Crim. App. Okla. Certiorari denied. Reported below: 688 P. 2d 342.

No. 84–979. Cross *v.* United States Parcel Service et al. C. A. 8th Cir. Certiorari denied. Reported below: 733 F. 2d 1327.

No. 84–989. Newspaper Drivers & Handlers, Local No. 372, Affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America *v.* National Labor Relations Board et al. C. A. 6th Cir. Certiorari denied. Reported below: 735 F. 2d 969.

No. 84–990. Toledo, Peoria & Western Railroad Co. *v.* Illinois Department of Transportation et al. C. A. 7th Cir. Certiorari denied. Reported below: 744 F. 2d 1296.

No. 84–992. Asociacion de Reclamantes et al. *v.* United Mexican States. C. A. D. C. Cir. Certiorari denied. Reported below: 237 U. S. App. D. C. 81, 735 F. 2d 1517.

No. 84–997. Lahodny *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 742 F. 2d 1463.

No. 84–1004. International Longshoremen's Association Locals 329 and 851, AFL–CIO, et al. *v.* Equal Employment Opportunity Commission. C. A. 5th Cir. Certiorari denied. Reported below: 746 F. 2d 810.

No. 84–1050. Jolley *v.* North Carolina. Sup. Ct. N. C. Certiorari denied. Reported below: 312 N. C. 296, 321 S. E. 2d 883.

No. 84–1051. McColgan et al. *v.* United Mine Workers of America et al. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 124 Ill. App. 3d 825, 464 N. E. 2d 1166.

No. 84–1065. KRAVITZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 738 F. 2d 102.

No. 84–1102. PHILIBOSIAN, DISTRICT ATTORNEY FOR THE COUNTY OF LOS ANGELES, ET AL. *v.* FEMINIST WOMEN'S HEALTH CENTER, INC., ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 157 Cal. App. 3d 1076, 203 Cal. Rptr. 918.

No. 84–1132. EASTWAY WOMEN'S CLINIC, INC. *v.* EASTWAY GENERAL HOSPITAL, LTD. C. A. 5th Cir. Certiorari denied. Reported below: 737 F. 2d 503.

No. 84–1137. INDIANAPOLIS COLTS *v.* MAYOR AND CITY COUNCIL OF BALTIMORE ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 741 F. 2d 954.

No. 84–1146. PRAVDA *v.* HALL ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 751 F. 2d 368.

No. 84–1149. LITCHFIELD *v.* SPIELBERG ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 736 F. 2d 1352.

No. 84–1154. QUINN *v.* STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. C. A. 10th Cir. Certiorari denied.

No. 84–1156. COX ENTERPRISES, INC., DBA AUSTIN AMERICAN-STATESMAN *v.* HARDY, JUDGE, 130TH DISTRICT COURT, MATAGORDA COUNTY, TEXAS; and

No. 84–1186. HOUSTON CHRONICLE PUBLISHING CO. *v.* HARDY, JUDGE, 130TH DISTRICT COURT, MATAGORDA COUNTY, TEXAS. Sup. Ct. Tex. Certiorari denied.

No. 84–1159. JENSEN, ADMINISTRATRIX OF THE ESTATES OF BROWN ET AL. *v.* CONRAD ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 747 F. 2d 185.

No. 84–1161. CAMPBELL *v.* PIERCE COUNTY, GEORGIA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 741 F. 2d 1342.

No. 84–1163. AGUILAR *v.* TEXAS. Ct. App. Tex., 10th Sup. Jud. Dist. Certiorari denied.

No. 84–1170. 20TH CENTURY WEAR, INC. *v.* SANMARK-STARDUST, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 747 F. 2d 81.

No. 84–1172. Gress *v.* Michigan. Ct. App. Mich. Certiorari denied.

No. 84–1174. Monzello *v.* Automobile Club of Southern California. C. A. 9th Cir. Certiorari denied. Reported below: 742 F. 2d 1462.

No. 84–1175. Nelson *v.* Texas. Ct. App. Tex., 12th Sup. Jud. Dist. Certiorari denied.

No. 84–1182. Boeing Co. et al. *v.* Islamic Republic of Iran et al. C. A. 9th Cir. Certiorari denied. Reported below: 739 F. 2d 464.

No. 84–1183. Self *v.* Alabama. Ct. Crim. App. Ala. Certiorari denied. Reported below: 459 So. 2d 978.

No. 84–1184. City of Montgomery et al. *v.* Williams. C. A. 11th Cir. Certiorari denied. Reported below: 742 F. 2d 586.

No. 84–1195. Nestier Corp. *v.* Menasha Corp. (Lewisystems Division). C. A. Fed. Cir. Certiorari denied. Reported below: 739 F. 2d 1576.

No. 84–1197. Deak-Perera Hawaii, Inc. *v.* Department of Transportation of Hawaii et al. C. A. 9th Cir. Certiorari denied. Reported below: 745 F. 2d 1281.

No. 84–1199. Moore *v.* Alabama. Ct. Crim. App. Ala. Certiorari denied. Reported below: 457 So. 2d 981.

No. 84–1201. Teichner *v.* Administrator of the Illinois Attorney Registration and Disciplinary System. Sup. Ct. Ill. Certiorari denied. Reported below: 104 Ill. 2d 150, 470 N. E. 2d 972.

No. 84–1202. Rig Hammers, Inc. *v.* Odeco Drilling, Inc. C. A. 5th Cir. Certiorari denied. Reported below: 744 F. 2d 1174.

No. 84–1205. International Woodworkers of America, Local 3–261 *v.* Kuhn, Personal Representative of the Estate of Kuhn. C. A. 9th Cir. Certiorari denied. Reported below: 742 F. 2d 1462.

No. 84-1211. NORMINTON ET AL. *v.* COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 158 Cal. App. 3d 997, 205 Cal. Rptr. 532.

No. 84-1213. CAR CARRIERS, INC., ET AL. *v.* FORD MOTOR CO. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 745 F. 2d 1101.

No. 84-1232. JACKSON *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 453 So. 2d 7.

No. 84-1242. PUCKETT *v.* CITY OF EMMETT, IDAHO. C. A. 9th Cir. Certiorari denied. Reported below: 746 F. 2d 1487.

No. 84-1243. RODGERS *v.* FISHER BODY DIVISION, GENERAL MOTORS CORP. C. A. 6th Cir. Certiorari denied. Reported below: 739 F. 2d 1102.

No. 84-1245. BURKE ET AL. *v.* ATLANTIC RESEARCH CORP. ET AL. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 393 Mass. 1103, 471 N. E. 2d 1354.

No. 84-1264. NOVA UNIVERSITY *v.* EDUCATIONAL INSTITUTION LICENSURE COMMISSION. Ct. App. D. C. Certiorari denied. Reported below: 483 A. 2d 1172.

No. 84-1269. DEWITT *v.* DEPARTMENT OF THE NAVY. C. A. Fed. Cir. Certiorari denied. Reported below: 747 F. 2d 1442.

No. 84-1286. CROSSON *v.* CONLEE, EXECUTOR OF THE ESTATE OF VIA. C. A. 4th Cir. Certiorari denied. Reported below: 745 F. 2d 896.

No. 84-1323. PERRY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 740 F. 2d 854 and 746 F. 2d 713.

No. 84-1334. SNYDER *v.* OHIO STATE MEDICAL BOARD. Ct. App. Ohio, Summit County. Certiorari denied.

No. 84-5426. HATCHER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 742 F. 2d 1457.

No. 84-5599. MCQUEEN *v.* MASSEY, SUPERINTENDENT, UNION CORRECTIONAL INSTITUTION. Dist. Ct. App. Fla., 1st Dist. Certiorari denied.

No. 84-5607. LISK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 740 F. 2d 964.

No. 84-5614. SCRIBER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 745 F. 2d 58.

No. 84-5668. CLARK *v.* MAGGIO, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 737 F. 2d 471.

No. 84-5702. ZARINSKY *v.* FENTON, SUPERINTENDENT, RAHWAY STATE PRISON. C. A. 3d Cir. Certiorari denied. Reported below: 746 F. 2d 1469.

No. 84-5739. PHELPS *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied.

No. 84-5801. AUSTIN *v.* YOUNG, SUPERINTENDENT, WAUPUN CORRECTIONAL INSTITUTION, WAUPUN, WISCONSIN. C. A. 7th Cir. Certiorari denied. Reported below: 742 F. 2d 1460.

No. 84-5837. DEVINCENT *v.* UNITED STATES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 746 F. 2d 1471.

No. 84-5879. BROWN *v.* BALKCOM, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 84-5914. HENRY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 747 F. 2d 708.

No. 84-5922. SLATER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 746 F. 2d 1473.

No. 84-6055. HANSON *v.* RUTHERFORD ET AL. Sup. Ct. Ore. Certiorari denied. Reported below: 297 Ore. 546, 685 P. 2d 997.

No. 84-6060. ROSS *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 738 F. 2d 1217.

No. 84-6062. GEIDEL *v.* FULCOMER ET AL. C. A. 3d Cir. Certiorari denied.

No. 84-6063. LEE *v.* STEPHENSON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 746 F. 2d 1472.

No. 84-6078. WILKINS *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 84–6083. BOUTA *v.* AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES. C. A. 8th Cir. Certiorari denied. Reported below: 746 F. 2d 453.

No. 84–6084. COVINGTON *v.* WINGER ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 746 F. 2d 1475.

No. 84–6087. LANKFORD *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA. Sup. Ct. Cal. Certiorari denied.

No. 84–6088. BRANCH *v.* CUPP, SUPERINTENDENT, OREGON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied. Reported below: 736 F. 2d 533.

No. 84–6092. BERKSON *v.* DEL MONTE CORP. ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 743 F. 2d 53.

No. 84–6094. TRYON *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 679 S. W. 2d 268.

No. 84–6097. MITCHELL *v.* SCULLY, SUPERINTENDENT, GREENHAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 746 F. 2d 951.

No. 84–6101. BEST *v.* HOLBROOK, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 753 F. 2d 1067.

No. 84–6105. COSTELLO *v.* HOLMES ET AL. Ct. Sp. App. Md. Certiorari denied.

No. 84–6107. HOWELL *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 61 Md. App. 726.

No. 84–6109. GEIDEL *v.* FULCOMER ET AL. C. A. 3d Cir. Certiorari denied.

No. 84–6110. GARDNER *v.* CITY OF DETROIT POLICE DEPARTMENT ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 751 F. 2d 385.

No. 84–6111. HOLSEY *v.* MARYLAND. Ct. App. Md. Certiorari denied.

No. 84–6112. HOLSEY *v.* WARD ET AL. Ct. App. Md. Certiorari denied.

No. 84-6115. TURNER *v.* BOSSE, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 749 F. 2d 34.

No. 84-6116. TYLER *v.* HARPER ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 744 F. 2d 653.

No. 84-6117. ZANI *v.* SIXTH SUPREME JUDICIAL DISTRICT COURT OF APPEALS OF TEXAS ET AL. C. A. 5th Cir. Certiorari denied.

No. 84-6118. ZANI *v.* PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 750 F. 2d 67.

No. 84-6124. KUANG HUNG HU *v.* MORGAN ET AL. C. A. 4th Cir. Certiorari denied.

No. 84-6125. BORGES *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 127 Ill. App. 3d 597, 469 N. E. 2d 321.

No. 84-6133. HAYES *v.* ROADWAY EXPRESS, INC. C. A. 6th Cir. Certiorari denied. Reported below: 746 F. 2d 1476.

No. 84-6138. MILBY *v.* NORTH CAROLINA DEPARTMENT OF CORRECTION. C. A. 4th Cir. Certiorari denied. Reported below: 738 F. 2d 430.

No. 84-6141. BARRON *v.* AIKEN, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 746 F. 2d 1470.

No. 84-6143. GREENE *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 460 So. 2d 317.

No. 84-6148. JAMAL *v.* GREER, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 746 F. 2d 1483.

No. 84-6149. ESTRADA *v.* PHELPS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 753 F. 2d 1081.

No. 84-6152. FRIEDMAN *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 746 F. 2d 1476.

No. 84-6192. BERTULFO *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 758 F. 2d 663.

No. 84-6197. LEE *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 220 U. S. App. D. C. 86, 679 F. 2d 263.

No. 84-6200. ROBERTS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 749 F. 2d 404.

No. 84-6202. COPELAND *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 758 F. 2d 662.

No. 84-6203. SMITH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 746 F. 2d 1473.

No. 84-6204. RAY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 751 F. 2d 272.

No. 84-6209. RAMIREZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 749 F. 2d 39.

No. 84-6214. BUSH *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 749 F. 2d 1227.

No. 84-6215. BONNETTS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 747 F. 2d 1159.

No. 84-6217. MARTELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 742 F. 2d 1463.

No. 84-6218. BUCHWALD *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 751 F. 2d 477.

No. 84-6219. GATES *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 481 A. 2d 120.

No. 84-6220. BANKS *v.* VASQUEZ, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 84-6228. SCHAFLANDER ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 743 F. 2d 714.

No. 84-6229. NORTH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 746 F. 2d 627.

No. 84-6232. JARDINA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 747 F. 2d 945.

No. 84-6237. MALONE *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 84–6247. KIMBERLIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 746 F. 2d 811.

No. 84–6248. VICKERS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 755 F. 2d 933.

No. 84–6260. BUIDE-GOMEZ ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 744 F. 2d 781.

No. 84–6273. MULLINS *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 83–6493. IRVING *v.* MISSISSIPPI. Sup. Ct. Miss.;
No. 84–6051. ALLEN *v.* GEORGIA. Sup. Ct. Ga.; and
No. 84–6170. GILLIES *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: No. 83–6493, 441 So. 2d 846; No. 84–6051, 253 Ga. 390, 321 S. E. 2d 710; No. 84–6170, 142 Ariz. 564, 691 P. 2d 655.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 84–826. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS *v.* BOYKINS. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 737 F. 2d 1539.

No. 84–839. KEMP, WARDEN *v.* SPRAGGINS. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 720 F. 2d 1190.

No. 84–875. ARIZONA PUBLIC SERVICE CO. ET AL. *v.* SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY. C. A. 9th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition.* Reported below: 745 F. 2d 67.

No. 84–939. JAPAN AIR LINES CO., LTD. *v.* ABRAMSON. C. A. 3d Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 739 F. 2d 130.

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*See also note, *supra*, p. 1046.

No. 84-1002. UNITED TELECOMMUNICATIONS, INC., ET AL. *v.* SAFFELS, UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF KANSAS. C. A. 10th Cir. Motion of Chamber of Commerce of the United States of America for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 741 F. 2d 312.

No. 84-1166. WEISS *v.* YORK HOSPITAL ET AL.; and
No. 84-1187. MEDICAL AND DENTAL STAFF OF YORK HOSPITAL *v.* WEISS. C. A. 3d Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of these petitions.* Reported below: 745 F. 2d 786.

No. 84-5548. SMITH *v.* JAGO, SUPERINTENDENT, LONDON CORRECTIONAL INSTITUTION. C. A. 6th Cir. Certiorari denied. Reported below: 740 F. 2d 969.

JUSTICE WHITE, with whom THE CHIEF JUSTICE and JUSTICE BRENNAN join, dissenting.

Despite his claim that he was in Florida at the time of the crime, extensive evidence linked petitioner Smith to a rape he was charged with committing in Ohio. Pursuant to Rule 16(C) of the Ohio Rules of Criminal Procedure, the State requested reciprocal discovery from the defense, and the trial court ordered petitioner to provide full discovery by October 30, 1981. On November 11, 1981, shortly after petitioner was returned from another prison to the jail of the county where he was to be tried, petitioner met with his defense attorney to discuss his case, which would be heard the next day. Petitioner then told his attorney that there were three alibi witnesses he wished to call at the trial, and the attorney orally informed the prosecutor's office of the name of one of these witnesses. The day of trial, petitioner formally filed discovery listing all three witnesses. The trial court allowed the testimony of the first witness, a convicted felon who testified that petitioner was in Florida, not Ohio, shortly before and after the rape. But the trial judge excluded the testimony of the other two witnesses because of petitioner's failure to inform the prosecutors of their testimony earlier. According to the proffer of testimony, the excluded witnesses would testify that petitioner had called

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*See also note, *supra*, p. 1046.

them repeatedly from Florida, where he was living during the month the rape occurred, and that the telephone calls could be substantiated by phone company records.

Petitioner was convicted of rape, and he subsequently filed a petition for a writ of habeas corpus in federal court. Habeas relief was denied by the District Court, and the Court of Appeals for the Sixth Circuit affirmed, 740 F. 2d 969 (1984), finding that the trial court's exclusion of the alibi witnesses' testimony was a constitutionally permissible sanction for petitioner's failure to timely comply with the reciprocal discovery request.

The exclusion of defense witnesses because a defendant failed to produce their names before a procedural deadline raises a substantial question implicating the Sixth Amendment right of the accused to present witnesses on his own behalf. We have twice left this question open, *Wardius* v. *Oregon*, 412 U. S. 470, 472, n. 4 (1973); *Williams* v. *Florida*, 399 U. S. 78, 83, n. 14 (1970), and there are those who have found arguable constitutional infirmity in such exclusionary sanctions. See, *e. g.*, 2 ABA Standards for Criminal Justice 11–4.7(a) and accompanying commentary (2d ed. 1980); Clinton, The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials, 9 Ind. L. Rev. 711, 838–839 (1976); Westen, The Compulsory Process Clause, 73 Mich. L. Rev. 71, 137–139 (1974); Note, 81 Yale L. J. 1342 (1972). Another Federal Court of Appeals has explicitly ruled that "the compulsory process clause of the sixth amendment forbids the exclusion of otherwise admissible evidence solely as a sanction to enforce discovery rules or orders against criminal defendants." *United States* v. *Davis*, 639 F. 2d 239, 243 (CA5 1981). Accord, *Hackett* v. *Mulcahy*, 493 F. Supp. 1329 (NJ 1980). See also *Ronson* v. *Commissioner of Correction of State of N. Y.*, 604 F. 2d 176 (CA2 1979). Similar provisions allowing the sanction of testimony exclusion for failure to comply with a discovery request exist in many, if not most, other States. See *Taliaferro* v. *State*, 295 Md. 376, 387, 456 A. 2d 29, 35, cert. denied, 461 U. S. 948 (1983).

This case thus presents a constitutional issue of widespread importance, one we have left unresolved, and one over which the Courts of Appeals are divided. I would grant certiorari and resolve this issue, which will surely not disappear of its own accord.

No. 84–5716. LINELL *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari. Reported below: 283 Ark. 162, 671 S. W. 2d 741.

No. 84–5736. WHITE *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 300 Md. 719, 481 A. 2d 201.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments, I would vacate the judgment of the Court of Appeals of Maryland insofar as it leaves undisturbed the death sentence imposed in this case. See *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting); *Furman* v. *Georgia*, 408 U. S. 238, 314 (1972) (MARSHALL, J., concurring). However, even if I believed that the death penalty could constitutionally be imposed under certain circumstances, I would grant certiorari and vacate the death sentence imposed here.

The petitioner was sentenced pursuant to a statute that *requires* that a death sentence be imposed *whenever* the mitigating circumstances do not outweigh the aggravating circumstances. Md. Ann. Code, Art. 27, § 413(h) (1982). The statute leaves no room for the jury to consider whether death is the appropriate punishment in a specific case. For the reasons I stated earlier this Term in *Stebbing* v. *Maryland*, 469 U. S. 900 (1984) (dissenting from denial of certiorari), I believe that such a statute is unconstitutional. The question presented here, which is also presented by other state statutes, is clearly worthy of this Court's attention. See, *e. g.*, *Maxwell* v. *Pennsylvania*, 469 U. S. 971 (1984) (MARSHALL, J., dissenting from denial of certiorari); *Smith* v. *North Carolina*, 459 U. S. 1056 (1982) (STEVENS, J., respecting denial of certiorari). I therefore dissent from the Court's refusal to hear this case.

No. 84–5770. STULL *v.* UNITED STATES. C. A. 6th Cir. Certiorari and other relief denied. Reported below: 743 F. 2d 439.

No. 84–6089. JONES *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 456 So. 2d 380.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

I continue to adhere to my view that the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments. See *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting). I also continue to believe that the death penalty's cruel and unusual nature is made all the more arbitrary and freakish when it is imposed by a judge in the face of a jury determination that death is an inappropriate punishment. See *Spaziano* v. *Florida*, 468 U. S. 447, 467 (1984) (STEVENS, J., dissenting); cf. *Heiney* v. *Florida*, 469 U. S. 920 (1984) (MARSHALL, J., dissenting from denial of certiorari).

In *Spaziano* v. *Florida*, this Court upheld the constitutionality of a state sentencing scheme under which, if the judge could make certain specified findings, he was given authority to override a jury decision for life imprisonment. This case, however, presents the problem of a State's decision to give its judges unguided discretion to overturn such jury decisions. I see this as an important issue of capital sentencing law, and so would grant the petition.

In *Spaziano*, as in this case, after a full hearing, a jury determined that death was not the appropriate punishment. Nevertheless, as in this case, the trial judge overrode that determination and sentenced the defendant to die. In rejecting Spaziano's argument that his death sentence had been meted out in an unconstitutionally arbitrary manner, this Court noted that, under Florida law, the trial judge could not exercise free-wheeling discretion. To the contrary, Florida had forbidden its trial judges to reject such jury decisions unless the evidence favoring death was "so clear and convincing that virtually no reasonable person could differ." *Tedder* v. *State*, 322 So. 2d 908, 910 (Fla. 1975). This Court rejected Spaziano's allegation of arbitrariness and emphasized "the significant safeguard the *Tedder* standard affords a capital defendant." *Spaziano*, 468 U. S., at 465. "We are satisfied," the Court declared, "that the Florida Supreme Court takes that standard seriously." *Ibid.*

In the opinion below, 456 So. 2d 380 (1984), however, the Alabama Supreme Court has made clear that under that State's system a trial judge need make no finding with respect to a jury verdict of life comparable to that which *Tedder* requires of Florida judges. The Alabama trial judge must simply "consider" the jury's "advisory" sentence. Ala. Code § 13A-5-47(e) (1982). This duty to "consider" may apparently add up to little more than the authority to reject a jury sentence when a judge disagrees with it. Such simple disagreement is illustrated by this case, where the trial judge independently reviewed the evidence, made findings, weighed aggravating and mitigating circumstances (all of which had previously been done by the jury), and then determined that the jury had simply been wrong—for in the judge's view death was appropriate "beyond a reasonable doubt and to a moral certainty." 456 So. 2d 366, 379 (Ala. Crim. App. 1983). But the jury was not criticized for irresponsibility or irrationality; to the contrary, the trial judge explicitly stated that it was "not chastising or inferring that the jury was lax in their responsibility." *Ibid.* The judge simply stated that "society must be protected and that an example must be set forth and made apparent so that our citizens may be secure in their homes and businesses." *Ibid.* Most glaring is the fact that the judge made absolutely no effort to ascertain on what basis the jury reached the contrary conclusion. Rather, the judge wrote that "the Court must follow the dictates of its own conscience." *Ibid.*

This system is quite different from a system where there is no jury, for here there has been a life sentence determination by a properly selected and instructed jury which has been witness to all the evidence and arguments. Where such a determination has been made, it must at least account for something. Under Florida's *Tedder* rule, a judge must at least engage in the awesome task of determining whether he can say, in spite of a jury's rejection of death, that death was so clearly appropriate that the jury determination was virtually beyond reason. Under Alabama's approach, however, the judge is called on to decide little more than whether he agrees with the jury determination. Alabama asks the trial judge to make an inquiry no different than the one it asks of each juror, and like any "juror," he may express his views of the case. But, under the statute, he plays the role of a "juror" with the exclusive power of decision, so the views of the real jurors become legally irrelevant once he reaches his conclusion. Although he must "consider" the jury's determination, he can reject it without explanation, on no more basis than "considered" disagreement. It approaches the most literal sense of the word "arbitrary" to put one to death in the face of a contrary jury determination where it is accepted that the jury had indeed responsibly carried out its task.

The Eighth Amendment at least mandates that an execution only be the consequence of a "process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake." *Eddings* v. *Oklahoma*, 455 U. S. 104, 118 (1982) (O'CONNOR, J., concurring). Here, the judge based the death sentence on his understanding of the evidence and his evaluation of aggravating and mitigating circumstances. But the jury had previously examined the same facts, made findings, evaluated all aggravating and mitigating factors, and reached a determination that death would be inappropriate. Where such a jury finding has been made, the Eighth Amendment requires more than that the trial judge declare that he has considered but disagrees with the conclusion of that admittedly responsible and informed jury.

No. 84–6316 (A–654). DE LA ROSA *v.* TEXAS. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, denied. Certiorari denied. Reported below: 743 F. 2d 299.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay and the petition for writ of certiorari and would vacate the death sentence in this case.

Rehearing Denied

No. 83–1153. MILLS MUSIC, INC. *v.* SNYDER ET AL., 469 U. S. 153;

No. 83–1378. EVITTS, SUPERINTENDENT, BLACKBURN CORRECTIONAL COMPLEX, ET AL. *v.* LUCEY, 469 U. S. 387;

No. 84–452. TODD *v.* UNITED STATES, 469 U. S. 1189;

No. 84–820. POLYAK *v.* HULEN ET AL., 469 U. S. 1190;

No. 84–5798. DEMORAN *v.* CALIFORNIA, 469 U. S. 1194; and

No. 84–5848. IN RE TYLER, 469 U. S. 1206. Petitions for rehearing denied.

No. 84–5921. WILLIAMS *v.* PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, 469 U. S. 1222. Petition for rehearing denied.

MARCH 19, 1985

Miscellaneous Order

No. A–705. YOUNG *v.* KEMP, WARDEN. Application for stay of execution of sentence of death scheduled for Wednesday, March 20, 1985, presented to JUSTICE REHNQUIST, and by him referred to the Court, denied. JUSTICE STEVENS would grant the application. JUSTICE POWELL took no part in the consideration or decision of this application.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976) (BRENNAN, J., dissenting), I would grant Young's application for a stay of execution. But even if I believed otherwise, I would stay this execution. When Young's jury was selected, jurors opposed to the death penalty were excluded in accordance with the currently permissible *voir dire* process in capital cases. See *Wainwright* v. *Witt*, 469 U. S. 412 (1985). Young claims that this exclusion rendered the resulting jury biased in favor of conviction, thus violating his right to an impartial jury and his right to a jury from which an identifiable segment of the community has not been excluded. Although the Eleventh Circuit has rejected this claim, *Spinkellink* v. *Wainwright*, 578 F. 2d 582, 583–596 (1978), cert. denied, 440 U. S. 976 (1979), the Eighth Circuit sitting en banc has recently held in identical circumstances that the defendant's Sixth and Fourteenth Amendment rights to an impartial jury were violated. *Grigsby* v. *Mabry*, 758 F. 2d 226 (1985). This Court is certain to grant certiorari in the immediate future to resolve the conflict between the Circuits.

Young alleged that his jury was conviction-prone in his first petition for habeas corpus in 1982. Relying on Eleventh Circuit precedent, the District Court denied the claim, and Young did not press the issue before the Eleventh Circuit. This habeas petition was fully litigated prior to the Eighth Circuit's decision in *Grigsby*. Young now pleads in his second federal habeas petition that the jury at his trial was "stacked" against him in precisely the way condemned by the en banc Eighth Circuit in *Grigsby*. For the reasons stated by JUSTICE MARSHALL in *Witt* v. *Wainwright*, *ante*, p. 1039 (MARSHALL, J., dissenting), Young's argument that a stay should be granted is compelling. *Sanders* v. *United States*, 373 U. S. 1, 17 (1963), left no doubt that a claim raised for the first time in a second or later habeas petition should receive full consideration if "the ends of justice" demand. There is no justice in sending Young to his death without the benefit of the full consideration of his claim that will surely come when this Court grants certiorari to decide the *Grigsby* issue.

MARCH 25, 1985*

Affirmed on Appeal

No. 83–1868. WHITE *v.* DOUGHERTY COUNTY BOARD OF EDUCATION ET AL. Affirmed on appeal from D. C. M. D. Ga. JUSTICE BLACKMUN and JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. Reported below: 579 F. Supp. 1480.

Appeals Dismissed

No. 84–18. TALAMINI, ADMINISTRATRIX OF THE ESTATE OF TALAMINI *v.* ALLSTATE INSURANCE CO. Appeal from C. A. 3d Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. JUSTICE WHITE, believing that there is no final judgment to review, would dismiss for want of jurisdiction.

JUSTICE STEVENS, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN join, concurring.

Appellant filed a two-count complaint against appellee seeking to recover damages under two Pennsylvania statutes.[1] The Dis-

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*JUSTICE POWELL took no part in the consideration or decision of the orders announced on this date, with the exception of No. 84–18, *Talamini, Administratrix of the Estate of Talamini* v. *Allstate Insurance Co.*, *infra*, this page.

[1] Count I sought recovery under Pennsylvania's No-fault Motor Vehicle Insurance Act, Pa. Stat. Ann., Tit. 40, §§ 1009.101–1009.701 (Purdon Supp. 1984–1985) (repealed 1984). Count II sought recovery under Pennsylvania's

trict Court granted a motion to dismiss Count II and appellant tried to appeal from that order under 28 U. S. C. § 1291. The Court of Appeals for the Third Circuit dismissed the appeal, presumably because the District Court's dismissal of only one count of the complaint was not a final order. Appellant has invoked our appellate jurisdiction under 28 U. S. C. § 1254, arguing that Pennsylvania courts would treat the District Court's dismissal as a final order and that the federal courts should also treat the dismissal as final under the collateral-order doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949). I find no merit to that argument and agree that the appeal should be dismissed; treating it as a petition for a writ of certiorari, the petition should be denied.

Appellee filed a nine-page motion to dismiss or affirm in which it correctly pointed out that a court of appeals does not have jurisdiction over an appeal from a district court order dismissing less than all of the claims alleged in a complaint unless the district court has made the express determination that Rule 54(b) of the Federal Rules of Civil Procedure requires.[2] In the concluding section of its printed motion, appellee requests the Court to award it "double costs and attorneys fees incurred."[3] Because three Members of the Court have expressed the opinion that the request should be treated as a formal motion and that it should be granted

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Unfair Insurance Practices Act, Pa. Stat. Ann., Tit. 40, §§ 1171.1–1171.15, and Unfair Trade Practices and Consumer Protection Law, Pa. Stat. Ann., Tit. 73, § 201–9.2 (Purdon Supp. 1984–1985). The complaint was originally filed in the state court and removed by appellee to the Federal District Court because of the parties' diverse citizenship.

[2] Rule 54(b), entitled "JUDGMENT UPON MULTIPLE CLAIMS OR INVOLVING MULTIPLE PARTIES," provides:

"When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."

[3] Motion to Dismiss or Affirm 9.

"to the extent of awarding appellee $1,000 against Bruce Martin Ginsburg, Esq., appellant's counsel, pursuant to this Court's Rule 49.2," *post*, at 1073, it is appropriate to explain briefly why the request should be denied.[4]

Appellee is entirely correct in pointing to the jurisdictional defect in this appeal. Moreover, it is a defect that competent counsel should readily recognize. Nevertheless, this procedural error is one that has been frequently overlooked by a large number of experienced attorneys and judges in other cases.[5] It is not the kind of egregious error that may properly provide the basis for sanctions against an attorney. There are, moreover, two additional reasons why it would be unwise judicial administration to grant a motion of this kind.

Because of the large number of applications for review that are regularly filed in this Court, the public interest in the efficient administration of our docket requires that we minimize the time devoted to the disposition of applications that are plainly without merit.[6] Any evenhanded attempt to determine which of the unmeritorious applications should give rise to sanctions, and which should merely be denied summarily, would be a time-consuming and unrewarding task. It would require us either to adopt a procedure for assessing a fair compensatory damages award in particular cases, or to impose a somewhat arbitrary penalty whenever such a motion is granted. Unless there has been a gross abuse of the judicial process, or demonstrable and significant harm to a litigant, such action is unwarranted.[7]

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[4] The desire for similar action has been expressed in several cases in recent years. See, *e. g., Potamkin Cadillac Corp.* v. *United States*, 462 U. S. 1144 (1983) (BURGER, C. J., and REHNQUIST and O'CONNOR, JJ.); *Escofil* v. *Pennsylvania*, 462 U. S. 1117 (1983) (REHNQUIST and O'CONNOR, JJ.); *In re Rush*, 462 U. S. 1117 (1983) (BURGER, C. J., and REHNQUIST and O'CONNOR, JJ.); *Garcia* v. *United States*, 462 U. S. 1116 (1983) (BURGER, C. J., and REHNQUIST and O'CONNOR, JJ.); *Gullo* v. *McGill*, 462 U. S. 1101 (1983) (BURGER, C. J., and REHNQUIST and O'CONNOR, JJ.).

[5] See, *e. g., Burney* v. *Pawtucket*, 728 F. 2d 547, 549 (CA1 1984) *(per curiam); Wolf* v. *Banco Nacional de Mexico, S. A.*, 721 F. 2d 660, 661–662 (CA9 1983); *Liskey* v. *Oppenheimer & Co.*, 717 F. 2d 314, 321 (CA6 1983); *Sandoz* v. *Crain Brothers, Inc.*, 694 F. 2d 88, 89 (CA5 1982) *(per curiam);* cf. 10 C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2657, pp. 60–61 (1983) ("Unfortunately, it is not always easy to tell whether a case involves multiple claims (to which Rule 54(b) is applicable) or a single claim supported by multiple grounds (to which Rule 54(b) is not applicable). The line between deciding one of several claims and deciding only part of a single claim is sometimes very obscure") (footnote omitted).

[6] Cf. *Roadway Express, Inc.* v. *Piper*, 447 U. S. 752, 757, n. 4 (1980) ("The glacial pace of much litigation breeds frustration with the federal courts and, ultimately, disrespect for the law").

Of greater importance than the practical problems associated with the processing of motions of this kind is the symbolic significance of the action that THE CHIEF JUSTICE proposes. Freedom of access to the courts is a cherished value in our democratic society. Incremental changes in settled rules of law often result from litigation.[8] The courts provide the mechanism for the peaceful resolution of disputes that might otherwise give rise to attempts at self-help. There is, and should be, the strongest presumption of open access to all levels of the judicial system. Creating a risk that the invocation of the judicial process may give rise to punitive sanctions simply because the litigant's claim is unmeritorious could only deter the legitimate exercise of the right to seek a peaceful redress of grievances through judicial means.[9] This Court, above all, should uphold the principle of open access.

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[7] The earliest version of this Court's Rule 49.2, enacted in 1803, provided: "In all cases where a writ of error shall delay the proceedings on the judgment of the circuit court, and shall appear to have been sued out merely for delay, damages shall be awarded at the rate of *ten per centum per annum*, on the amount of the judgment." Rules and Orders of the Supreme Court of the United States, 1 Cranch xvi, xviii (1803) (Rule XVII) (emphasis in original). Since that time the Rule has been revised and renumbered numerous times. See Rules of the Supreme Court of the United States, Revised and Corrected at December Term, 1858, 21 How. v, XIII (1858) (Rule 23.3); Rules of the Supreme Court Announced January 7, 1884, 108 U. S. 573, 586 (1884) (Rule 23.2); Revised Rules of the Supreme Court of the United States, 266 U. S. 653, 674 (1925) (Rule 28.2); Revised Rules of the Supreme Court of the United States, 275 U. S. 595, 617 (1928) (Rule 30.2); Revised Rules of the Supreme Court of the United States, 346 U. S. 951, 1006 (1954) (Rules 56.2 and 56.4). However, despite the 182-year existence of Rule 49.2 and its predecessors, it appears that they have rarely been invoked. See, *e. g.*, *Tatum* v. *Regents of University of Nebraska*, 462 U. S. 1117 (1983); *Bohn* v. *Bohn*, 316 U. S. 646, 647 (1942) *(per curiam)* ("it appearing that the appeal was frivolous and taken merely for delay"); *Roe* v. *Kansas*, 278 U. S. 191, 193 (1929); *Slaker* v. *O'Connor*, 278 U. S. 188, 190 (1929); *Wagner Electric Mfg. Co.* v. *Lyndon*, 262 U. S. 226, 232 (1923) ("We are asked by counsel for appellees to impose a penalty on the appellant for delay. The history of the case and the conduct of the Wagner Company leave no doubt that the litigation in the federal jurisdiction and the successive appeals have been prosecuted solely for delay"); *Deming* v. *Carlisle Packing Co.*, 226 U. S. 102, 106 (1912) ("That the unsubstantial and frivolous character of the only Federal question relied upon of necessity embraces the conclusion that the writ was prosecuted for delay is in our opinion indubitable"); cf. *Gibbs* v. *Diekma*, 131 U. S. App. clxxxvi, clxxxvii (1880) ("[I]t is so apparent the appeal was vexatious and for delay only, that we adjudge to the appellees five hundred dollars as just damages for their delay").

[8] See, *e. g.*, *Abney* v. *United States*, 431 U. S. 651 (1977); *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469 (1975); *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949).

This is not, of course, to suggest that courts should tolerate gross abuses of the judicial process. If there is reason to believe that counsel have pursued unmeritorious litigation merely in order to generate fees for themselves, for example, judges should bring the matter to the attention of the appropriate disciplinary authorities.[10] Or if it appears that unmeritorious litigation has been prolonged merely for the purposes of delay, with no legitimate prospect of success, an award of double costs and damages occasioned by the delay may be appropriate.[11] But the strong presumption is

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[9] Justice Field eloquently penned this point on the occasion of the announcement of his retirement:

"As I look back over the more than a third of a century that I have sat on this bench, I am more and more impressed with the immeasurable importance of this court. Now and then we hear it spoken of as an aristocratic feature of a Republican government. But it is the most Democratic of all. Senators represent their States, and Representatives their constituents, but this court stands for the whole country, and as such it is truly 'of the people, by the people, and for the people.' It has indeed no power to legislate. It cannot appropriate a dollar of money. It carries neither the purse nor the sword. *But it possesses the power of declaring the law, and in that is found the safeguard which keeps the whole mighty fabric of government from rushing to destruction. This negative power, the power of resistance, is the only safety of a popular government . . . .*" Letter of Resignation of Justice Stephen J. Field, 168 U. S. App. 716 (1897) (emphasis added).

[10] See Model Rules of Professional Conduct and Code of Judicial Conduct, Rule 1.5 (1983) ("A lawyer's fee shall be reasonable").

[11] This Court's Rule 49.2 provides:

"When an appeal or petition for writ of certiorari is frivolous, the Court may award the appellee or the respondent appropriate damages."

This Court's Rule 50.7 states that "[i]n an appropriate instance, the Court may adjudge double costs." Cf. Model Rules of Professional Conduct and Code of Judicial Conduct, Rule 3.2 (1983) ("A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of his client"). The comment following this rule states:

"Dilatory practices bring the administration of justice into disrepute. Delay should not be indulged merely for the convenience of the advocates, or for the against the imposition of sanctions for invoking the processes of the law.

If the Court has treated appellee's request as a motion under our Rule 49.2, the Court has correctly denied the motion.

CHIEF JUSTICE BURGER, with whom JUSTICE REHNQUIST and JUSTICE O'CONNOR join.

I agree that we should dismiss this appeal, but I would go beyond that. This appeal is an attempt to invoke the Court's jurisdiction on an utterly frivolous claim. Such efforts should subject the attorney who filed the jurisdictional statement to the sanction of Rule 49.2 of this Court,* at least where, as here, the appellee has moved for an award of costs and fees.

Appellant, the administratrix of her husband's estate, filed a complaint in state court seeking insurance benefits from appellee. Count I of the complaint sought benefits under Pennsylvania's No-fault Motor Vehicle Insurance Act, Pa. Stat. Ann., Tit. 40, §§ 1009.101–.701 (Purdon Supp. 1984–1985) (repealed 1984). Count II alleged that appellee had violated Pennsylvania's Unfair Insurance Practices Act, *id.*, § 1171.1 *et seq.*, and sought statutory

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purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client."

See also *id.*, Rule 3.1 ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law"). The comment to that rule, in pertinent part, states:

"[T]he law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change. . . . [An] action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person or if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law."

*Rule 49.2 provides: "When an appeal or petition for writ of certiorari is frivolous, the Court may award the appellee or the respondent appropriate damages."

penalties under Pennsylvania's Unfair Trade Practices and Consumer Protection Law, Pa. Stat. Ann., Tit. 73, § 201-9.2 (Purdon Supp. 1984-1985).

Appellee removed the suit to Federal District Court based on the parties' diversity of citizenship. On appellee's motion, the District Court dismissed Count II for failure to state a claim upon which relief could be granted, holding that the Pennsylvania laws upon which appellant relied do not provide any private right of action. Appellant immediately appealed to the United States Court of Appeals for the Third Circuit. The Court of Appeals granted appellee's motion to dismiss on the grounds that the District Court decision was not a final judgment and that the Court of Appeals thus lacked jurisdiction. Appellant then filed a jurisdictional statement with this Court, asserting that the Court of Appeals' dismissal of her appeal was erroneous and a violation of due process.

The Court of Appeals' action was unquestionably correct. See 28 U. S. C. § 1291; Fed. Rule Civ. Proc. 54(b). Not only is appellant's appeal to this Court completely frivolous on the merits, but also her attempt to bring the case here by way of appeal is totally improper; appellate jurisdiction is plainly lacking. See 28 U. S. C. § 1254(2).

Appellee has moved for an award of costs and fees for its expense in responding to this frivolous appeal. We afforded appellant the opportunity to respond to this motion; appellant's response provided nothing to meet the claim that the appeal is demonstrably frivolous. I would grant the motion to the extent of awarding appellee $1,000 against Bruce Martin Ginsburg, Esq., appellant's counsel, pursuant to this Court's Rule 49.2.

It is suggested that two objectives justify the Court's refusal to apply Rule 49.2 in this and similar cases: (a) efficient use of the Court's time, and (b) affirmance of the principle of free access to the courts. Both objectives unquestionably are commendable, but the perspective is too narrow. Judicious use of the sanction of Rule 49.2 in egregious cases—and this is an egregious case—should discourage many of the patently meritless applications that are filed here each year. In the long run, this is the more effective way to "minimize the time devoted to the disposition of applications that are plainly without merit," *ante*, at 1069; after all, that is the whole purpose of Rule 49.2. Further, while freedom of access to the courts is indeed a cherished value, every misuse of any court's time impinges on the right of other litigants with valid or at least arguable claims to gain access to the judicial process. The time this Court expends examining and processing frivolous applications is very substantial, and it is time that could be devoted to considering claims which merit consideration.

Rule 49.2 has a purpose which has too long been ignored; it is time we applied it. I would apply it here.

No. 84–337. CRUMPACKER *v.* INDIANA SUPREME COURT DISCIPLINARY COMMISSION. Appeal from Sup. Ct. Ind. dismissed for want of substantial federal question.

CHIEF JUSTICE BURGER.

I agree that we should dismiss this appeal for want of a substantial federal question, but I would go beyond that. This effort to invoke the Court's jurisdiction on an utterly frivolous claim should subject the attorney who filed the jurisdictional statement to the sanction of Rule 49.2 of this Court.

Appellant Owen W. Crumpacker, formerly a licensed attorney in a Hammond, Indiana, law firm was disbarred by order of the Indiana Supreme Court on November 29, 1978. *In re Crumpacker*, 269 Ind. 630, 383 N. E. 2d 36 (1978), cert. denied, 444 U. S. 979 (1979). Appellant continued to practice law despite his disbarment. On February 11, 1982, following a hearing, the Indiana Supreme Court held appellant in contempt for defying the 1978 disbarment order; appellant was also held in contempt as a result of his disruptive behavior during the hearing and served a 90-day sentence for the contempt. *In re Crumpacker*, 431 N. E. 2d 91. His appeal was dismissed for want of a substantial federal question, 459 U. S. 803 (1982).

On release, appellant continued to ignore the Indiana Supreme Court's disbarment order. On July 25, 1983, the Indiana Supreme Court Disciplinary Commission filed another complaint against appellant, alleging that he was again practicing law without a license. After appellant failed to appear at the hearing scheduled for November 15, 1983, despite being duly notified, the Indiana Supreme Court ordered that a warrant issue for appellant's arrest. Appellant was apprehended on April 4, 1984, and brought before the Indiana Supreme Court to show cause why he should not be found in contempt for his failure to appear. After a hearing, in which appellant offered no reasonable explanation for his failure to abide by the disbarment order, the Indiana Supreme Court once again found appellant in contempt and ordered him confined to 30 days in prison.

Appellant's jurisdictional statement filed in this Court launches an utterly frivolous constitutional attack on the Indiana Supreme Court's power to hold him in contempt for ignoring its orders and for disbarring him in 1978. The Indiana Supreme Court's authority over unauthorized practitioners of law is beyond dispute. See, *e. g.*, Ind. Code §§ 33–2—3–1 and 34–4—7–3 (1982). On this record there is no conceivable basis for raising any challenge to the order of the Indiana Supreme Court holding appellant in contempt for failing to appear at the November 15 hearing.

I would award appellee $1,000 against Andrew G. Kohlan, Esq., appellant's attorney, pursuant to this Court's Rule 49.2.*

No. 84–1155. WESTINGHOUSE ELECTRIC CORP. *v.* KING, COMMISSIONER OF REVENUE OF TENNESSEE. Appeal from Sup. Ct. Tenn. dismissed for want of substantial federal question. Reported below: 678 S. W. 2d 19.

No. 84–1303. CADDO PARISH SCHOOL BOARD *v.* BRYAN ET AL. Appeal from Ct. App. La., 2d Cir., dismissed for want of substantial federal question. Reported below: 455 So. 2d 699.

No. 84–6164. RIDER *v.* FLORIDA. Appeal from Dist. Ct. App. Fla., 3d Dist., dismissed for want of substantial federal question. Reported below: 449 So. 2d 903.

No. 84–1176. CONSOLIDATED EDISON COMPANY OF NEW YORK, INC. *v.* PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK ET AL. Appeal from Ct. App. N. Y. Motion of Edison Electric Institute for leave to file a brief as *amicus curiae* granted. Request of counsel for appellant to delete Brooklyn Union Gas Co. as a party to this proceeding denied. Appeal dismissed for want of substantial federal question. Reported below: 63 N. Y. 2d 424, 472 N. E. 2d 981.

JUSTICE WHITE, with whom JUSTICE BLACKMUN joins, dissenting.

The Public Utility Regulatory Policies Act of 1978, Pub. L. 95–617, 92 Stat. 3117 (PURPA), is part of a broad congressional response to the energy crisis. One of its provisions, § 210 of Title II, 16 U. S. C. § 824a-3, is designed to promote the development of alternative energy resources by overcoming the historical reluctance of electric utilities to purchase power from nontraditional facilities. *FERC* v. *Mississippi*, 456 U. S. 742, 750 (1982). Section 210(a) authorizes the Federal Energy Regulatory Commission (FERC) to promulgate "such rules as it determines necessary to encourage cogeneration and small power production," including rules requiring utilities to offer to purchase electricity from qualifying small power production facilities. Section 210(b) requires that the rates for such purchases be "just and reasonable" and nondiscriminatory, and that no FERC rule "shall provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy."

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*Rule 49.2 provides: "When an appeal or petition for writ of certiorari is frivolous, the Court may award the appellee or respondent appropriate damages."

Pursuant to § 210(a), FERC requires utilities to purchase electricity from qualifying facilities. See 18 CFR § 292.303(a)(1984). In an apparent effort to encourage decentralized power production as much as possible, FERC adopted the maximum rate allowed by the statute—the incremental, or "full avoided cost," standard—for such purchases. See § 292.304(b)(2); see also 45 Fed. Reg. 12214, 12222 (1980). We upheld its choice in *American Paper Institute, Inc.* v. *American Electric Power Service Corp.*, 461 U. S. 402 (1983).

Though PURPA is a federal statute whose administration lies with FERC, "implementation" of the statute is left in large measure to the States. See § 210(f), 16 U. S. C. § 824a-3(f); 18 CFR § 292.401(1984). Thus, a State can, under certain circumstances, set rates that are lower than full avoided costs, 18 CFR § 292.304(b)(3)(1984); a qualifying facility and a utility can negotiate for lower rates, § 292.301(b)(1); and the state regulatory authority or any nonregulated utility may apply to FERC for a waiver, § 292.403. The question in the present case is just how far a State can go in the other direction. In particular, the question is whether a State can require utilities to pay more than the full avoided cost rate for their mandatory purchases.

New York has set a minimum rate of six cents per kilowatt hour for utility purchases from qualifying facilities. N. Y. Pub. Serv. Law § 66-c (McKinney Supp. 1984-1985). Appellant challenged the law, arguing that it could not be required to pay six cents per kilowatt hour for the times when its avoided costs fell below that amount. The Appellate Division of the New York Supreme

Court agreed. 98 App. Div. 2d 377, 471 N. Y. S. 2d 684 (1983). It held the six cent per kilowatt hour minimum invalid to the extent it exceeded the federally mandated avoided cost rate. In its view, PURPA, coupled with the Federal Power Act, occupied the field of energy regulation, and FERC had exclusive ratesetting jurisdiction. It also relied on the statute's "just and reasonable" provision, which requires "consideration of potential rate savings to consumers," *American Paper Institute, supra,* at 415, n. 9, and on a statement in the legislative history that incremental cost was to be "an upper limit on the price at which utilities can be required under this section to purchase electric energy," H. R. Conf. Rep. No. 95-1750, p. 98 (1978).

The New York Court of Appeals reversed, 63 N. Y. 2d 424, 472 N. E. 2d 981 (1984), viewing the state and federal laws as complementary rather than conflicting. The court read both the statute and the legislative history to intend a cap only on rates set by FERC, and noted that the New York statute was consistent with the federal Act's overall purpose. It also pointed out that FERC, in explaining its regulations, had said that "the States are free under their own authority, to enact laws or regulations providing for rates which would result in even greater encouragement of these technologies," and that only state rates *below* the federal rate would have to "yield to federal law." 45 Fed. Reg., at 12221.*

In upholding the New York statute, the Court of Appeals reached a conclusion in conflict with the Kansas Supreme Court. See *Kansas City Power & Light Co.* v. *Kansas Corporation Comm'n,* 234 Kan. 1052, 676 P. 2d 764 (1984). Relying on the statement in *American Paper Institute* that the avoided cost rate "applies in the absence of a waiver or a specific contractual agreement," 461 U. S., at 416, the Kansas court held that the state regulatory commission could not set rates for purchases from cogenerators that were higher than avoided cost.

There is no reconciling the decisions of these two state courts of last resort. Both rest on plausible arguments. The question over which they are divided, and which, in the posture of this case, falls

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*Commentators have relied on these statements to conclude that the States can set higher rates. *E. g.,* Lornell, A PURPA Primer, 3 Solar L. Rep. 31, 53 (1981); Lock, Statewide Purchase Rates Under Section 210 of PURPA, 3 Solar L. Rep. 419, 445-450 (1981).

within our mandatory jurisdiction, is substantial. Moreover, it has arisen in other proceedings, see Lock, Statewide Purchase Rates Under Section 210 of PURPA, 3 Solar L. Rep. 419, 445 (1981), and should be expected to recur. Appellant points to 10 other States besides New York that have authorized or required payments to qualifying facilities in excess of avoided cost. Juris. Statement 12, n. Oregon, for example, has established a rate said to be "well in excess of avoided costs" on the theory that the statutory ceiling applies only to FERC. Hagler, Utility Purchases of Decentralized Power: The PURPA Scheme, 5 Stan. Envtl. L. Ann. 154, 163 (1983). Overall, the States have taken a variety of approaches to ratesetting under PURPA. See generally Lock & Van Kuiken, Cogeneration and Small Power Production: State Implementation of Section 210 of PURPA, 3 Solar L. Rep. 659 (1981). The effective, orderly, and consistent administration of PURPA requires that the extent of their authority to do so be settled.

The federal question here is thus "substantial" in two senses—it is both open to debate and important. I dissent from the Court's conclusion to the contrary.

No. 84–1293. KELLEY *v.* TEXAS REAL ESTATE COMMISSION. Appeal from Ct. App. Tex., 14th Sup. Jud. Dist., dismissed for want of jurisdiction. Reported below: 671 S. W. 2d 936.

Vacated and Remanded on Appeal

No. 84–1082. OPPENHEIMER & CO., INC. *v.* YOUNG. Appeal from Sup. Ct. Fla. Judgment vacated and case remanded for further consideration in light of *Dean Witter Reynolds Inc.* v. *Byrd*, *ante*, p. 213. JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. Reported below: 456 So. 2d 1175.

Certiorari Granted—Vacated and Remanded

No. 83–2101. DANIEL *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Lindahl* v. *Office of Personnel Management*, *ante*, p. 768. Reported below: 732 F. 2d 167.

No. 83–6034. SWANSON *v.* MERIT SYSTEMS PROTECTION BOARD ET AL. C. A. Fed. Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of

Lindahl v. *Office of Personnel Management, ante,* p. 768. Reported below: 723 F. 2d 69.

No. 83-6093. GATES *v.* U. S. POSTAL SERVICE. C. A. Fed. Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Lindahl* v. *Office of Personnel Management, ante,* p. 768. Reported below: 727 F. 2d 1117.

No. 83-6440. SMITH *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Lindahl* v. *Office of Personnel Management, ante,* p. 768. Reported below: 727 F. 2d 1117.

No. 83-7032. BOWDEN *v.* FRANCIS, WARDEN. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Ake* v. *Oklahoma, ante,* p. 68. Reported below: 733 F. 2d 740.

JUSTICE O'CONNOR, with whom JUSTICE WHITE and JUSTICE REHNQUIST join, dissenting.

By its action today, the Court vacates the judgment of the Court of Appeals and remands this case for reconsideration in light of *Ake* v. *Oklahoma, ante,* p. 68. Because I believe that *Ake* is not applicable to the present case, I respectfully dissent.

Petitioner was convicted of murder and sentenced to death. Before trial, defense counsel filed a special plea of insanity and requested the appointment of a psychiatrist to examine petitioner. The trial court, after a hearing, found that the evidence suggesting petitioner's incompetency was insufficient to warrant a psychiatric examination. The court then advised defense counsel that it would proceed to summon a jury to try petitioner on the issue of competence to stand trial if petitioner wished to litigate his special plea of insanity. Counsel rejected the offer and withdrew the special plea. Petitioner subsequently took the stand at trial and testified coherently in his own behalf. After his conviction and sentence were affirmed on direct appeal, petitioner sought federal habeas relief arguing that the trial court should have granted the requested psychiatric examination to determine his competency and that he also should have received the assistance of a psychiatrist to gather mitigating evidence.

The Court of Appeals affirmed the District Court's denial of habeas relief. 733 F. 2d 740 (CA11 1984). With respect to the trial court's refusal to order a pretrial examination, the Court of Appeals agreed with the Federal District Court and the state courts that petitioner had failed to present evidence raising a bona fide doubt as to his competency. As to psychiatric assistance to gather mitigating evidence, the Court of Appeals found no constitutional error because petitioner had not requested the state trial court to appoint a psychiatrist for that purpose. The petition before this Court renews the contentions that the trial court erred in not ordering a pretrial psychiatric examination and that petitioner was entitled to the assistance of a psychiatrist to present mitigating evidence. The Court of Appeals will be understandably confused by the Court's action in vacating the judgment and remanding for reconsideration in light of *Ake*. Because *Ake* does not suggest that the Court of Appeals erred in its disposition of this case, I would deny the petition for certiorari.

No. 84–244. FLORIDA *v.* NEASE, AKA COLWELL. Dist. Ct. App. Fla., 4th Dist. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Florida* v. *Rodriguez*, 469 U. S. 1 (1984). Reported below: 442 So. 2d 325.

Miscellaneous Orders

No. — — ——. LYNN *v.* ILLINOIS. Motion to direct the Clerk to file a petition for writ of certiorari without the affidavit of indigency executed by petitioner denied.

No. A–695. DRAPE *v.* UNITED STATES. C. A. 8th Cir. Application to recall and stay pending timely filing of a petition for writ of certiorari, addressed to JUSTICE WHITE and referred to the Court, denied.

No. D–452. IN RE DISBARMENT OF SHANKMAN. Disbarment entered. [For earlier order herein, see 469 U. S. 808.]

No. D–454. IN RE DISBARMENT OF WEST. Disbarment entered. [For earlier order herein, see 469 U. S. 808.]

No. D-461. IN RE DISBARMENT OF POWERS. Disbarment entered. [For earlier order herein, see 469 U. S. 978.]

No. D-468. IN RE DISBARMENT OF DIANGELUS. Disbarment entered. [For earlier order herein, see 469 U. S. 1083.]

No. D-469. IN RE DISBARMENT OF UTERMAHLEN. Disbarment entered. [For earlier order herein, see 469 U. S. 1102.]

No. D-484. IN RE DISBARMENT OF WOLLRAB. It is ordered that James Edward Wollrab, of St. Louis, Mo., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-485. IN RE DISBARMENT OF LOGAN. It is ordered that Alex Gerhart Logan III, of Tustin, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-486. IN RE DISBARMENT OF DELK. It is ordered that Leonard Adolph Delk, of San Diego, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-487. IN RE DISBARMENT OF TABMAN. It is ordered that Irving Tabman, of Island Park, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 83-1894. PATTERN MAKERS' LEAGUE OF NORTH AMERICA, AFL-CIO, ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 7th Cir. [Certiorari granted, 469 U. S. 814];

No. 83-2161. MONTANA ET AL. *v.* BLACKFEET TRIBE OF INDIANS. C. A. 9th Cir. [Certiorari granted, 469 U. S. 815]; and

No. 84-9. MASSACHUSETTS MUTUAL LIFE INSURANCE CO. ET AL. *v.* RUSSELL. C. A. 9th Cir. [Certiorari granted, 469 U. S. 816.] Cases restored to calendar for reargument.

No. 84–435. RUSSELL *v.* UNITED STATES. C. A. 7th Cir. [Certiorari granted, 469 U. S. 1206.] Motion of the Solicitor General to permit Christopher J. Wright, Esquire, to present oral argument *pro hac vice* granted.

No. 84–518. JOHNSON ET AL. *v.* MAYOR AND CITY COUNCIL OF BALTIMORE ET AL.; and

No. 84–710. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION *v.* MAYOR AND CITY COUNCIL OF BALTIMORE ET AL. C. A. 4th Cir. [Certiorari granted, 469 U. S. 1156.] Motion of the Solicitor General for divided argument granted.

No. 84–786. MAINE *v.* MOULTON. Sup. Jud. Ct. Me. [Certiorari granted, 469 U. S. 1206.] Motion for appointment of counsel granted, and it is ordered that Anthony Whitcomb Beardsley, Esquire, of Ellsworth, Me., be appointed to serve as counsel for respondent in this case.

No. 84–801. MIDLANTIC NATIONAL BANK *v.* NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION; and

No. 84–805. O'NEILL, TRUSTEE IN BANKRUPTCY OF QUANTA RESOURCES CORP., DEBTOR *v.* CITY OF NEW YORK ET AL; and O'NEILL, TRUSTEE IN BANKRUPTCY OF QUANTA RESOURCES CORP., DEBTOR *v.* NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION. C. A. 3d Cir. [Certiorari granted, 469 U. S. 1207.] Motion of the parties to dispense with printing the joint appendix granted.

No. 84–822. AMERICAN NATIONAL BANK & TRUST COMPANY OF CHICAGO ET AL. *v.* HAROCO, INC., ET AL. C. A. 7th Cir. [Certiorari granted, 469 U. S. 1157.] Motion of petitioners to dispense with printing the joint appendix granted.

No. 84–5636. ALCORN *v.* SMITH, WARDEN. C. A. 6th Cir. [Certiorari granted, *ante,* p. 1003.] Motion for appointment of counsel granted, and it is ordered that Mary Gail Robinson, of Frankfort, Ky., be appointed to serve as counsel for petitioner in this case.

No. 84–6315. IN RE MCDONALD. Petition for writ of habeas corpus denied.

No. 84–6168. IN RE CARTER; and

No. 84–6179. IN RE STRAGER. Petitions for writs of mandamus denied.

Probable Jurisdiction Noted

No. 84–1044. PACIFIC GAS & ELECTRIC CO. *v.* PUBLIC UTILITIES COMMISSION OF CALIFORNIA ET AL. Appeal from Sup. Ct. Cal. Probable jurisdiction noted. JUSTICE BLACKMUN took no part in the consideration or decision of this case.*

No. 84–1076. TRANSCONTINENTAL GAS PIPE LINE CORP. *v.* STATE OIL AND GAS BOARD OF MISSISSIPPI ET AL. Appeal from Sup. Ct. Miss. Probable jurisdiction noted. Reported below: 457 So. 2d 1298.

No. 84–1244. DAVIS ET AL. *v.* BANDEMER ET AL. Appeal from D. C. S. D. Ind. Motion of appellees to strike the brief of Members of the California Democratic Congressional Delegation as *amicus curiae* denied. Probable jurisdiction noted. Reported below: 603 F. Supp. 1479.

Certiorari Granted

No. 84–1240. LAKE COAL CO., INC. *v.* ROBERTS & SCHAEFER CO. C. A. 6th Cir. Certiorari granted. Reported below: 751 F. 2d 386.

No. 84–1273. REGENTS OF THE UNIVERSITY OF MICHIGAN *v.* EWING. C. A. 6th Cir. Certiorari granted. Reported below: 742 F. 2d 913.

Certiorari Denied. (See also No. 84–18, *supra.*)

No. 83–1275. OREGON DEPARTMENT OF COMMERCE *v.* PAYNE. Ct. App. Ore. Certiorari denied. Reported below: 61 Ore. App. 165, 656 P. 2d 361, and 62 Ore. App. 433, 661 P. 2d 119.

No. 83–1629. MILLER *v.* MERCY HOSPITAL. C. A. 4th Cir. Certiorari denied. Reported below: 720 F. 2d 356.

No. 84–808. NEVADA ET AL. *v.* HODEL, SECRETARY OF THE INTERIOR, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 741 F. 2d 257.

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*See also note *, *supra*, p. 1067.

No. 84–944. HEIMBACH, COUNTY EXECUTIVE OF ORANGE COUNTY *v.* CHU, COMMISSIONER OF NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 744 F. 2d 11.

No. 84–950. MYERS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 745 F. 2d 733.

No. 84–988. CITY OF NEW YORK MUNICIPAL BROADCASTING SYSTEM (WNYC) *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 240 U. S. App. D. C. 203, 744 F. 2d 827.

No. 84–1058. OFFICE & PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, AFL–CIO, ET AL. *v.* BOWMAN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 744 F. 2d 1207.

No. 84–1139. BRENNAN ET AL. *v.* HOBSON ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 237 U. S. App. D. C. 219, 737 F. 2d 1.

No. 84–1204. MIMS *v.* INTERNAL REVENUE SERVICE. C. A. 4th Cir. Certiorari denied. Reported below: 745 F. 2d 51.

No. 84–1217. STERLING DRUG INC. *v.* FEDERAL TRADE COMMISSION. C. A. 9th Cir. Certiorari denied. Reported below: 741 F. 2d 1146.

No. 84–1219. KLIMEK *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 84–1221. ROLLFORM INC. ET AL. *v.* WEINAR ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 744 F. 2d 797.

No. 84–1226. BADHAM ET AL. *v.* SECRETARY OF STATE OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 749 F. 2d 36.

No. 84–1228. HOLMES ET AL. *v.* ROSS, INDEPENDENT EXECUTOR OF THE ESTATE OF ROSS. Ct. App. Tex., 11th Sup. Jud. Dist. Certiorari denied. Reported below: 672 S. W. 2d 315.

No. 84–1246. DAHLBERG *v.* BECKER ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 748 F. 2d 85.

No. 84–1251. OHIO *v.* LUCK. Sup. Ct. Ohio. Certiorari denied. Reported below: 15 Ohio St. 3d 150, 472 N. E. 2d 1097.

No. 84–1254. Local Union No. 2812, Lumber, Production & Industrial Workers *v.* Missoula White Pine Sash Co. C. A. 9th Cir. Certiorari denied. Reported below: 734 F. 2d 1384.

No. 84–1315. Capps *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 754 F. 2d 372.

No. 84–1318. Pipeline Local Union No. 38, Affiliated With the Laborers' International Union of North America, AFL–CIO *v.* National Labor Relations Board. C. A. 5th Cir. Certiorari denied. Reported below: 748 F. 2d 1001.

No. 84–1327. Soto et al. *v.* Dickey et al. C. A. 7th Cir. Certiorari denied. Reported below: 744 F. 2d 1260.

No. 84–1331. Rodgers *v.* United States; and

No. 84–1342. Sargent Electric Co. et al. *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 750 F. 2d 1183.

No. 84–1333. Cutaia *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 751 F. 2d 373.

No. 84–1335. Shnurman *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 747 F. 2d 1466.

No. 84–1337. Mandalay Shores Cooperative Housing Assn., Inc., et al. *v.* Pierce, Secretary of Housing and Urban Development, et al. C. A. 11th Cir. Certiorari denied. Reported below: 746 F. 2d 813.

No. 84–5195. Berna *v.* Arkansas. Sup. Ct. Ark. Certiorari denied. Reported below: 282 Ark. 563, 670 S. W. 2d 434.

No. 84–5597. Monaghan *v.* United States. C. A. D. C. Cir. Certiorari denied. Reported below: 239 U. S. App. D. C. 275, 741 F. 2d 1434.

No. 84–5662. Wright *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 742 F. 2d 1450.

No. 84–5742. Galloway *v.* Allsbrook et al. C. A. 4th Cir. Certiorari denied. Reported below: 746 F. 2d 1471.

No. 84–5904. Ballard *v.* Virginia. Sup. Ct. Va. Certiorari denied. Reported below: 228 Va. 213, 321 S. E. 2d 284.

No. 84–5951. NEAL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 743 F. 2d 1441.

No. 84–5955. GOETZ *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 746 F. 2d 1480.

No. 84–6067. JAMES *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 679 S. W. 2d 238.

No. 84–6144. DAY *v.* AMOCO CHEMICALS CORP. C. A. 5th Cir. Certiorari denied. Reported below: 747 F. 2d 1462.

No. 84–6147. MCNEAIR *v.* SUBURBAN HOSPITAL ASSN., INC. C. A. 4th Cir. Certiorari denied. Reported below: 749 F. 2d 31.

No. 84–6155. HILL *v.* STATE BAR OF GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 253 Ga. 422, 321 S. E. 2d 731.

No. 84–6157. MOORE *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 84–6172. COKER *v.* WILLIAMS, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 752 F. 2d 648.

No. 84–6173. DINGLE *v.* SIMPKINS, ADMINISTRATOR OF THE ESTATE OF DINGLE. Sup. Ct. S. C. Certiorari denied.

No. 84–6175. SIBIGA ET UX. *v.* HETTLEMAN ET AL. Ct. Sp. App. Md. Certiorari denied. Reported below: 59 Md. App. 739.

No. 84–6180. CURRIE *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied.

No. 84–6188. FLORES *v.* PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 745 F. 2d 338.

No. 84–6193. KLAYER *v.* AVERY FEDERAL SAVINGS & LOAN ASSN. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 734 F. 2d 13.

No. 84–6201. BRODIS *v.* DETROIT BOARD OF EDUCATION. C. A. 6th Cir. Certiorari denied. Reported below: 751 F. 2d 384.

No. 84–6206. STUCKEY *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF FRESNO (CALIFORNIA, REAL PARTY IN INTEREST). Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 84–6207. SOLOMON *v.* HARRIS, WARDEN, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 749 F. 2d 1.

No. 84–6208. WILLIAMS *v.* SOUTHERN BELL TELEPHONE & TELEGRAPH CO. C. A. 11th Cir. Certiorari denied.

No. 84–6225. PROVOW *v.* MINTZES, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 84–6243. BETKA *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 9th Cir. Certiorari denied.

No. 84–6281. LOTT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 751 F. 2d 717.

No. 84–6282. GONZALEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 751 F. 2d 372.

No. 84–6291. RODRIGUEZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 751 F. 2d 875.

No. 84–6323. FABIAN *v.* RYAN. C. A. 11th Cir. Certiorari denied.

No. 84–6330. JAQUES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 753 F. 2d 1084.

No. 84–6334. KARABINAS *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 63 N. Y. 2d 871, 472 N. E. 2d 321.

No. 84–1047. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS *v.* SMITH. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 741 F. 2d 1248.

No. 84–1099. SOUTHWEST SECURITY EQUIPMENT CORP. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 9th Cir. Motion of National Right to Work Legal Defense Foundation for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 736 F. 2d 1332.

No. 84–1110. 40 EASTCO *v.* CITY OF NEW YORK. C. A. 2d Cir. Certiorari denied. JUSTICE MARSHALL took no part in the consideration or decision of this petition.* Reported below: 746 F. 2d 135.

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*See also note *, *supra*, p. 1067.

No. 84–5870. FINNEY *v.* GEORGIA. Sup. Ct. Ga.;

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No. 84–6255. BRILEY *v.* BASS, WARDEN. C. A. 4th Cir.; and

No. 84–6275. WELCOME *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: No. 84–5870, 253 Ga. 346, 320 S. E. 2d 147; No. 84–6139, 741 F. 2d 1248; No. 84–6153, 458 So. 2d 750; No. 84–6255, 750 F. 2d 1238; No. 84–6275, 458 So. 2d 1235.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 84–5943. THOMAS *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 301 Md. 294, 483 A. 2d 6.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Adhering to my view that the death penalty is under all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments, I would vacate the judgment of the Maryland Court of Appeals insofar as it left undisturbed the death sentence imposed in this case. *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting). However, even if I believed that the death penalty could constitutionally be imposed under certain circumstances, I would grant certiorari and vacate the death sentence imposed here.

To my mind, the Constitution requires that the State bear the burden of proving that a death sentence is appropriate in a given case. In two ways, the Maryland statute precludes this allocation of the burden of proof. First, it places on the defendant the burden of convincing the sentencer that mitigating evidence outweighs aggravating evidence, and it *requires* that a death sentence be imposed whenever aggravating factors are not outweighed. Md. Ann. Code, Art. 27, § 413(h)(1982). The statute thereby places on the defendant the burden of proving that which is, under the existing statute, the ultimate question.

Second, by requiring that death be the sentence whenever aggravating factors are not outweighed, the statute prevents the sentencer from making what to my mind must be the ultimate inquiry: whether death is the appropriate sentence in a given defendant's case. For the reasons I stated earlier this Term in *Stebbing* v. *Maryland,* 469 U. S. 900 (1984) (dissenting from denial of certiorari), I believe that such a statute is unconstitutional, and I therefore dissent from the Court's refusal to hear this case.

No. 84–6174. MITCHELL *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari. Certiorari denied. Reported below: 105 Ill. 2d 1, 473 N. E. 2d 1270.

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No. 84–5783. BILLIOT *v.* MISSISSIPPI, 469 U. S. 1230; and

No. 84–5901. CHANEY *v.* NATIONAL RAILROAD PASSENGER CORPORATION, 469 U. S. 1221. Petitions for rehearing denied.

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1. *Education of disadvantaged children—Federal grants—Eligibility of local schools.*—Substantive standards of 1978 Amendments to Act, relaxing eligibility requirements for local schools to receive federal funds under Title I of Act to support education of disadvantaged children in low-income areas, do not apply retroactively to determine if Title I funds were misused under previously made federal grants. Bennett v. New Jersey, p. 632.

2. *Education of disadvantaged children—Federal grants—Eligibility of local schools.*—Under Act's provisions and implementing regulations regarding States' assurances that federal grants to support education of disadvantaged children would be used only for eligible programs under Title I of Act and would only supplement, not supplant, state and local expenditures for education, Secretary of Education properly determined that Kentucky, in approving certain classes offered by some local education agencies, had violated its assurances of compliance with Title I, thereby misusing Title I funds and being liable to repay funds to Secretary. Bennett v. Kentucky Dept. of Education, p. 656.

ELEVENTH AMENDMENT. See **Indians,** 2.

EMPLOYER AND EMPLOYEES. See **Civil Rights Act of 1964; Constitutional Law,** I, 2, 3; **Federal Employers' Liability Act; Jurisdiction,** 1.

EMPLOYMENT DISCRIMINATION. See **Civil Rights Act of 1964.**

EQUAL PROTECTION OF THE LAWS. See **Constitutional Law, II; III, 2.**

EXECUTION BY DRUG INJECTION. See **Administrative Procedure Act.**

EXEMPTION OF UNITED STATES OBLIGATIONS FROM STATE TAXATION. See **State Property Taxes.**

FEDERAL ARBITRATION ACT.

Alleged violations of both federal and state law—Arbitration of state-law claims.—Where (1) respondent customer filed a Federal District Court action alleging that petitioner broker-dealer had violated Securities Exchange Act of 1934 and various state-law provisions, and (2) petitioner filed a motion to compel arbitration of pendent state-law claims under arbitration clause of parties' written agreement and to stay arbitration pending resolution of federal action—petitioner arguing that Arbitration Act required District Court to compel arbitration of state-law claims—District Court erred insofar as it refused to grant petitioner's motion to compel arbitration of such claims. Dean Witter Reynolds Inc. v. Byrd, p. 213.

FEDERAL COURTS IMPROVEMENT ACT OF 1982. See **Jurisdiction, 1.**

FEDERAL ELECTION CAMPAIGN ACT OF 1971. See **Constitutional Law, III, 1.**

FEDERAL EMPLOYERS' LIABILITY ACT.

State-court action—Jury instructions—Employee's loss of future earnings.—In a state-court action under Act, propriety of instructions concerning measure of damages is an issue of "substance" to be determined by federal law, and in an injured railroad employee's action against railroad, railroad is entitled, as a matter of federal law, to have jury instructed that it must determine present value of money awarded in a lump sum for employee's loss of future earnings. St. Louis Southwestern R. Co. v. Dickerson, p. 409.

FEDERAL FOOD, DRUG, AND COSMETIC ACT. See **Administrative Procedure Act.**

FEDERAL GRANTS FOR EDUCATION OF DISADVANTAGED CHILDREN. See **Elementary and Secondary Education Act of 1965.**

FEDERAL RULES OF CIVIL PROCEDURE. See **Civil Rights Act of 1964.**

FEDERAL RULES OF CRIMINAL PROCEDURE. See **Constitutional Law, I, 4; Criminal Law, 2.**

FEDERAL-STATE RELATIONS. See **Constitutional Law, V; Convention on the Territorial Sea and the Contiguous Zone; Elementary and Secondary Education Act of 1965; Federal Arbitration Act; Federal Employers' Liability Act; Judgments; State Property Taxes; Voting Rights Act of 1965.**

FELON'S RECEIPT OR POSSESSION OF FIREARM. See **Criminal Law, 1.**

FIFTH AMENDMENT. See **Constitutional Law,** I, 3, 4; III, 2; IV; VI.

FINGERPRINTS. See **Constitutional Law,** VII, 1.

FIREARMS. See **Criminal Law,** 1.

FIRST AMENDMENT. See **Constitutional Law,** III.

FLAT-SUM DISREGARD FROM INCOME IN DETERMINING WELFARE BENEFITS. See **Social Security Act.**

FOOD AND DRUG ADMINISTRATION DECISIONS. See **Administrative Procedure Act.**

FOURTEENTH AMENDMENT. See **Constitutional Law,** I, 1, 2; VI.

FOURTH AMENDMENT. See **Constitutional Law,** VII.

FREEDOM OF ASSOCIATION. See **Constitutional Law,** III, 1; **Judgments.**

FREEDOM OF SPEECH. See **Constitutional Law,** III.

FULL FAITH AND CREDIT. See **Judgments.**

GEORGIA. See **State Property Taxes.**

GOVERNMENT EMPLOYEES. See **Civil Rights Act of 1964; Constitutional Law,** I, 1; **Jurisdiction,** 1.

HARBOR WORKERS. See **Longshoremen's and Harbor Workers' Compensation Act.**

HISTORIC BAYS. See **Convention on the Territorial Sea and the Contiguous Zone.**

HOBBS ACT. See **Jurisdiction,** 2.

ILLINOIS. See **Judgments.**

IMMUNITY FROM SUIT. See **Indians,** 2.

"INCOME" FOR DETERMINING WELFARE BENEFITS. See **Social Security Act.**

INDEPENDENT POLITICAL COMMITTEES' CAMPAIGN EXPENDITURES. See **Constitutional Law,** III, 1.

INDIAN CLAIMS COMMISSION ACT. See **Indians,** 1.

INDIANS.

1. *Aboriginal title to lands—"Payment" to Tribe.*—Where (1) Indian Claims Commission awarded compensation to Shoshone Tribe for loss of aboriginal title to certain lands, (2) amount of award was judicially affirmed and was deposited for Tribe in a trust account in United States Treasury, (3) because of Tribe's refusal to cooperate, Secretary of Interior could not submit to Congress a plan for distribution of fund, and (4) respondent Tribe members, in Government's trespass action against them, claimed that they still had aboriginal title, "payment" occurred under § 22(a) of Indian Claims Commission Act when funds were placed into trust account, extinguishing aboriginal title even though Congress had not approved a final distribution plan. United States v. Dann, p. 39.

2. *Invalid conveyance of tribal lands—Federal-court action.*—Where respondent Indian Tribes brought a Federal District Court action against petitioner counties alleging that Tribes' ancestors' conveyance of tribal lands to New York under a 1795 agreement was void because it violated Nonintercourse Act of 1793, which provided that no entity could purchase Indian land without Federal Government's approval, (1) Tribes had a federal common-law right of action for violation of their possessory rights, which right of action was not pre-empted by federal Nonintercourse Acts, (2) there was no merits to counties' alleged defenses based on "borrowing" state statute of limitations, laches, abatement of cause of action, asserted subsequent ratification by Federal Government of 1795 conveyance, or political question doctrine, and (3) federal courts below erred in exercising ancillary jurisdiction over counties' cross-claim for indemnity by State, since cross-claim raised state-law question and there was no showing that State waived its Eleventh Amendment immunity from suit in federal court on such question. County of Oneida v. Oneida Indian Nation, p. 226.

INSTRUCTIONS TO JURY. See **Federal Employers' Liability Act.**

INSURANCE COMPANIES. See **Constitutional Law,** II.

INVESTIGATIVE DETENTIONS. See **Constitutional Law,** VII, 1, 2.

JUDGMENTS.

State-court judgments—Preclusive effect in later federal-court action.—Where (1) petitioner orthopaedic surgeons' complaints in Illinois court, alleging that respondent organization's refusal to admit them as members violated their associational rights under Illinois common law, were dismissed for failure to state a cause of action, (2) petitioners then filed an action in Federal District Court, alleging that denial of membership violated Sherman Act, (3) District Court denied respondent's motion to dismiss, holding that under federal law state judgments did not bar Sherman Act claim, but (4) Court of Appeals held that, as a matter of federal law, claim preclusion barred federal antitrust action, federal courts below

JUDGMENTS—Continued.

erred in not considering Illinois law in determining preclusive effect of state judgments—fact that petitioners' antitrust claim was within exclusive jurisdiction of federal courts not necessarily making "full faith and credit" provisions of 28 U. S. C. § 1738 inapplicable. Marrese v. American Academy of Orthopaedic Surgeons, p. 373.

JUDICIAL REVIEW OF ADMINISTRATIVE DETERMINATIONS. See **Administrative Procedure Act; Jurisdiction.**

JURISDICTION.

1. *Merit Systems Protection Board—Denial of disability retirement claims—Judicial review.*—Title 5 U. S. C. § 8347(c) does not bar entirely judicial review of a Merit Systems Protection Board judgment affirming Office of Personnel Management's denial of a Government employee's disability retirement claim, but bars review only of factual determinations while permitting review as to departures from procedural rights, misconstruction of governing legislation, or similar errors going to heart of administrative determination; Court of Appeals for Federal Circuit has jurisdiction directly to review Board's disability retirement decisions under 5 U. S. C. § 7703(b)(1) and 28 U. S. C. § 1295(a)(9). Lindahl v. OPM, p. 768.

2. *Nuclear Regulatory Commission—Denial of citizen petition—Judicial review.*—Under 42 U. S. C. § 2239, federal courts of appeals have initial subject-matter jurisdiction over NRC's orders denying citizen petitions made pursuant to its rules, such as its denial of request by one of respondents for institution of administrative proceedings to suspend petitioner's license to operate nuclear reactor. Florida Power & Light Co. v. Lorion, p. 729.

JURORS. See **Constitutional Law,** I, 4.

JURY INSTRUCTIONS. See **Federal Employers' Liability Act.**

KENTUCKY. See **Elementary and Secondary Education Act of 1965,** 2.

LACHES. See **Indians, 2.**

LICENSES FOR NUCLEAR REACTORS. See **Jurisdiction, 2.**

LIMITATION OF ACTIONS. See **Indians, 2.**

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT.

Offshore oil-drilling platform—Injury to welder—"Maritime" employment.—Where respondent was injured while welding a gas flow line on a fixed offshore oil-drilling platform in a State's territorial waters, his em-

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT—Continued.

ployment was not "maritime," and thus he did not qualify for benefits under Act. Herb's Welding, Inc. v. Gray, p. 414.

"MARITIME" EMPLOYMENT. See **Longshoremen's and Harbor Workers' Compensation Act.**

McCARRAN-FERGUSON ACT. See **Constitutional Law, II.**

MERIT SYSTEMS PROTECTION BOARD'S JUDGMENTS. See **Jurisdiction, 1.**

MILITARY SELECTIVE SERVICE ACT. See **Constitutional Law, III, 2.**

MIRANDA WARNINGS. See **Constitutional Law, IV; VI.**

MISSISSIPPI. See **Convention on the Territorial Sea and the Contiguous Zone.**

MONTREAL AGREEMENT. See **Warsaw Convention.**

MOTOR VEHICLE SEARCHES. See **Constitutional Law, VII, 2.**

NEW HAMPSHIRE. See **Constitutional Law, V.**

NONINTERCOURSE ACT OF 1793. See **Indians, 2.**

NUCLEAR REGULATORY COMMISSION'S ORDERS. See **Jurisdiction, 2.**

OFFSHORE OIL-DRILLING PLATFORMS. See **Longshoremen's and Harbor Workers' Compensation Act.**

OHIO. See **Constitutional Law, I, 2.**

OIL. See **Longshoremen's and Harbor Workers' Compensation Act.**

OMNIBUS BUDGET RECONCILIATION ACT. See **Social Security Act.**

ORTHOPAEDIC SURGEONS. See **Judgments.**

OUTER CONTINENTAL SHELF LANDS ACT. See **Longshoremen's and Harbor Workers' Compensation Act.**

PASSENGERS' INJURIES FROM AIRCRAFT "ACCIDENT." See **Warsaw Convention.**

PLAIN ERROR. See **Criminal Law, 2.**

POLICE INTERROGATIONS. See **Constitutional Law, IV; VI.**

POLITICAL COMMITTEES' CAMPAIGN EXPENDITURES. See **Constitutional Law, III, 1.**

POLITICAL-QUESTION DOCTRINE. See **Indians, 2.**

POLLUTION. See **Clean Water Act.**

PRECLUSIVE EFFECT OF STATE-COURT JUDGMENT IN FEDERAL-COURT ACTION. See **Judgments.**

PRE-EMPTION OF FEDERAL COMMON-LAW ACTIONS BY FEDERAL STATUTES. See **Indians, 2.**

PRESENCE OF CRIMINAL DEFENDANT AT TRIAL. See **Constitutional Law, I, 4.**

PRESIDENTIAL ELECTION CAMPAIGN FUND ACT. See **Constitutional Law, III, 1.**

PRIVILEGE AGAINST SELF-INCRIMINATION. See **Constitutional Law, IV; VI.**

PRIVILEGES AND IMMUNITIES CLAUSE. See **Constitutional Law, V.**

PROPERTY TAXES. See **State Property Taxes.**

PROSECUTOR'S MISCONDUCT. See **Criminal Law, 2.**

PSYCHIATRIST'S ASSISTANCE FOR CRIMINAL DEFENDANT. See **Constitutional Law, I, 1.**

PUBLIC EMPLOYEES. See **Civil Rights Act of 1964; Constitutional Law, I, 2; Jurisdiction, 1.**

RAIL PASSENGER SERVICE ACT OF 1970. See **Constitutional Law, I, 3.**

RAILROAD EMPLOYEES' TRAVEL PRIVILEGES. See **Constitutional Law, I, 3.**

RAILROAD'S LIABILITY FOR EMPLOYEES' INJURIES. See **Federal Employers' Liability Act.**

REGISTRATION FOR DRAFT. See **Constitutional Law, III, 2.**

RESIDENCY REQUIREMENT FOR ADMISSION TO STATE BAR. See **Constitutional Law, V.**

RETIREMENT BENEFITS. See **Jurisdiction, 1.**

RETROACTIVITY OF DECISIONS. See **Constitutional Law, VI.**

RETROACTIVITY OF STATUTES. See **Elementary and Secondary Education Act of 1965, 1.**

RIGHT OF CRIMINAL DEFENDANT TO BE PRESENT AT TRIAL. See **Constitutional Law, I, 4.**

RIGHT TO COUNSEL. See **Constitutional Law, VI.**

SCHOOL DISTRICT ELECTIONS. See **Voting Rights Act of 1965.**

SCHOOLS. See **Elementary and Secondary Education Act of 1965.**

SEABED. See **Convention on the Territorial Sea and the Contiguous Zone.**

SEARCHES AND SEIZURES. See **Constitutional Law,** VII.

SECURITIES BROKER-DEALERS. See **Federal Arbitration Act.**

SECURITIES EXCHANGE ACT OF 1934. See **Federal Arbitration Act.**

SELECTIVE PROSECUTION OF NONREGISTRANTS FOR DRAFT. See **Constitutional Law,** III, 2.

SELF-INCRIMINATION. See **Constitutional Law,** IV; VI.

SEX DISCRIMINATION. See **Civil Rights Act of 1964.**

SHERMAN ACT. See **Judgments.**

SKETCHING OF JURORS BY CRIMINAL DEFENDANT. See **Constitutional Law,** I, 4.

SOCIAL SECURITY ACT.

AFDC benefits—Determination of family's need—Flat-sum disregard from income.—In calculating a family's need for Aid to Families with Dependent Children benefits, responsible state agency must treat mandatory tax withholdings as a work expense encompassed within flat-sum disregard of § 402(a)(8)(A)(ii) of Act, rather than as a separate deduction in determining "income" under § 402(a)(7)(A). Heckler v. Turner, p. 184.

SOUTH CAROLINA. See **Voting Rights Act of 1965.**

STANDING TO SUE. See **Constitutional Law,** III, 1.

STATE PROPERTY TAXES.

Taxation of United States obligations—Validity of Georgia law.—Revised Statutes § 3701, which provides for an exemption of United States obligations from state taxation, is satisfied by a Georgia property tax provision construed by Georgia Supreme Court so as to allow a bank to deduct from its net worth not full value of United States obligations it held but only percentage of federal obligations attributable to assets. First National Bank of Atlanta v. Bartow County Board of Tax Assessors, p. 583.

STATES' IMMUNITY FROM SUIT. See **Indians,** 2.

STATES' MISUSE OF FEDERAL GRANTS FOR EDUCATION OF DISADVANTAGED CHILDREN. See **Elementary and Secondary Education Act of 1965.**

STATE TAXES ON INSURANCE COMPANIES. See **Constitutional Law,** II.

STATUTES OF LIMITATIONS. See **Indians, 2.**

SUPREME COURT.

Presentation of Attorney General, p. VII.

SURGERY TO REMOVE BULLET FROM ACCUSED. See **Constitutional Law,** VII, 3.

TAXES. See **Constitutional Law,** II; **Social Security Act; State Property Taxes.**

TOXIC WASTES. See **Clean Water Act.**

TRAVEL PRIVILEGES OF RAILROAD EMPLOYEES. See **Constitutional Law,** I, 3.

TUCKER ACT. See **Jurisdiction,** 1.

UNITED STATES OBLIGATIONS' EXEMPTION FROM STATE TAXATION. See **State Property Taxes.**

VARIANCES FROM POLLUTION STANDARDS. See **Clean Water Act.**

VEHICLE SEARCHES. See **Constitutional Law,** VII, 2.

VOTING RIGHTS ACT OF 1965.

School District Trustees—Change in election laws—Attorney General's approval.—Where (1) Attorney General originally filed an objection to a change in South Carolina's statutes that proposed election at November 1982 general election of District Boards of Trustees for Hampton County's public schools, and required candidates to file between August 16 and 31, (2) shortly after November elections were held under prior, approved statutory provisions, Attorney General withdrew his objection to new law, and (3) County Election Commission—which, in contemplation of Attorney General's reconsideration of objection, had accepted candidate filings under new law—then scheduled an election under new law for March 15, 1983, use of August filing period in conjunction with March election, and setting of March election itself, were changes that should have been submitted to Attorney General under § 5 of Voting Rights Act. NAACP v. Hampton County Election Comm'n, p. 166.

WAIVER OF DEFENDANT'S RIGHT TO BE PRESENT AT CRIMINAL TRIAL. See **Constitutional Law,** I, 4.

WAIVER OF PRIVILEGE AGAINST SELF-INCRIMINATION. See **Constitutional Law,** IV.

WARSAW CONVENTION.

Airlines—Liability for passenger's injury—"Accident."—An airline's liability under Article 17 of Convention for a passenger's injury caused by an "accident" arises only if injury is caused by an unexpected or unusual

WARSAW CONVENTION—Continued.

event or happening that is external to passenger, and not where injury results from passenger's own internal reaction to usual, normal, and expected operation of aircraft (such as respondent passenger's loss of hearing in one ear allegedly caused by pressurization system of petitioner's jetliner during a landing). Air France v. Saks, p. 392.

WATERS. See **Clean Water Act; Convention on the Territorial Sea and the Contiguous Zone.**

WELFARE BENEFITS. See **Social Security Act.**

WORDS AND PHRASES.

1. *"Accident."* Art. 17, Warsaw Convention, note following 49 U. S. C. App. § 1502. Air France v. Saks, p. 392.

2. *"Income."* § 402(a)(7)(A), Social Security Act, 42 U. S. C. § 602(a)(7)(A). Heckler v. Turner, p. 184.

3. *"Maritime employment."* § 2(3), Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. § 902(3). Herb's Welding, Inc. v. Gray, p. 414.

4. *"Payment."* § 22(a), Indian Claims Commission Act, 25 U. S. C. § 70u(a) (1976 ed.). United States v. Dann, p. 39.

WORKERS' COMPENSATION. See **Longshoremen's and Harbor Workers' Compensation Act.**